(1)

Supreme Court, U.S.
FILED

No. 03-1431 APR 12 2004

In The

Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, INC., et. al.,

Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E.I. DuPONT de NEMOURS AND COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court must actually provide due process to non-resident class members or simply provide a procedure with the appearance of due process in order to establish jurisdiction over non-resident class members;

2. In the reviewing of a foreign court's assertion of jurisdiction over non-residence class members, whether the second court (the reviewing court) is bound by the jurisdictional recitals set forth in the foreign court's order;

3. Whether the due process accorded to class members in *Cox* and *Spencer* provided the minimum due process protection required under either a substantive or a procedural review, including:

    a. Whether due process requires notice to class members when their identity is contained in the Defendant's database before, during, and after class notice and settlement;

    b. Whether the failure to use subclasses to, e.g., align the interest of multi unit class members, violates *Amchem*;

    c. Whether class counsel conduct in, e.g., the acceptance of a $30 million fee to drop objections, or the settlement of private claims inventory for much larger payments, evidences inadequate representation; and,

    d. Whether a class which is too varied to constitute a state-wide class is sufficiently homogenous to be certified as a national class.

LIST OF PARTIES AND AFFILIATES

The Petitioners are listed below. The Respondents to the proceedings are listed in the caption of the Petition for Certification.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners are not publically owned. No publicly owned company owns ten percent or more of any Petitioner.

Petitioners

Hospitality Management Associates, Inc.
Alan B. Kahn d/b/a Hunt Club Forest, Best Capital Corp., and Kahn Development Co.
Anne L. Darby
Ashley Inns, a partnership, d/b/a Hampton Inn Riverview
Autumnwood Apartments of Walhalla, LP
Beaufort Inns, a partnership, d/b/a Holiday Inn (Beaufort)
Belle Ville Apartments of Clinton, LP
Berkeley Place Apartments of Moncks Corner, LP
Best Western Naval Center, Inc., d/b/a Holiday Inn Express
Bill Anderson and Pansy Anderson
Blackville Properties, LP
Breckenridge Apartments, Ltd.
Brookside Manor Apartments of Newberry, LP
Bryon Porth Rental Associates, LP
Buena Vista II Apartments of Union, LP
C. F. Deer Run Associates, Ltd.
C. F. Park Place Associates, Ltd.
C. F. Sedgefield Associates Ltd.
Cambridge Apartments of Summerville, LP
Canal Court, II, L.P., as general partner for Bentley Court, II, L.P.
Carolina Townhouses, Ltd.
Case Properties, L.L.C.

LIST OF PARTIES AND AFFILIATES – Continued

Castlewood Apartments of Winnsboro, LP
Castlewood II Apartments of Winnsboro, LP
Cedar Ridge Manor Apartments of Ware Shoals, LP
Center Street Townhouses, LP
Centerfield Manor of Denmark, LP
Charles P. Darby, III
Chesterfield Housing Associates, LP
Colony Square Apartments of Clinton, LP
Cottonwood Apartments, LP
Coventry Manor Apartments, Ltd.
Creekside Apartments of Piedmont, LP
Cricket Hill Apartments, LP
David Werton
Devonshire Apartments, LP
Dorchester Properties, LP
Durlach Corporation as managing agent for Parkshore Center and Summit Point
Eagles Landing Homeowners Association, Inc.
Edgewood Apartments of Fort Mill, LP
Edisto Apartments, Ltd.
Eugene Cone
F.D. Scott d/b/a River Ridge Townhouses
Fair Meadow Apartments, Ltd.
Forest View Apartments of Liberty, LP
Fort Mill Townhouses, Phase II, LP
Frenwood Rental Community, LP
Funderburk Housing & Construction Co., Inc. d/b/a Ashley Garden Apartments
G & C Housing, A S.C. Partnership
Gaffney Properties, LP
Glenfield Apartments of Bennettsville, LP
Glenfield Apartments of Bennettsville Phase II, LP
Harleyville Properties, LP
Harvin Manor Limited Partnership, Regency Investment Associates, Inc. and Gordon Blackwell, general partners
Hazelwood Manor of Johnston, LP

LIST OF PARTIES AND AFFILIATES – Continued

Heritage Square Apartments of Newberry, LP
Hidden Valley Apartments, Ltd.
Holly Springs Apartments, Ltd.
Jim England and Susan England
John R. Lee
Johnny Branton
Knollwood II Associates of Lancaster, SC, LP
LSM Enterprises, LLC d/b/a Frierson Mobile Home Park
Laurelwood Apartments of Winnsboro, LP
Laurelwood Apartments of Winnsboro, Phase II, LP
Lexington Downs, LP
McCormick Manor Apartments of McCormick, LP
McCormick Properties, LP
Magna Funding Corporation
Mannington Place, LP
Marina Variety Store, Inc.
Marion Manor Apartments of St. Stephen, LP
Marion Park Associates, A S.C. Partnership
Melvin Worley and Briarwood Mobile Home Park, Inc.
Midway Manor Apartments, Ltd.
Midway Manor II Apartments, Ltd.
North Bluff, North Charleston LP
North Oaks Apartments of Conway, LP
Oakview Townhouses, LP
Oakwood Manor of Bennettsville, LP
Ola Feagin and Tilman Feagin
Pavilion Properties, a South Carolina LP, Debtor In Possession
Pembrook Apartments, LP
Poplar Creek Apartments, Ltd.
Portfolio Investments
Pine Harbour Investment Co., L.L.C. and Bamberg East Apartments, LP
Raintree/Douglas, Ltd.
Richard Ackerman
Ridgecrest Apartments of Central, LP

LIST OF PARTIES AND AFFILIATES – Continued

Ridgeview Apartments of Pickens, LP;
Riverwinds Apartments of Camden, LP
St. George Properties, LP
Saluda Apartments, LP
Sandra C. Kirby
Sandra L. Cantrell
Shady Moss Apartments of Conway, LP
Shannon IV, A S.C. Partnership
Steeplechase I Apartments, LP
Steeplechase II Apartments, LP
Stonegate Apartments of Clover, LP
Summerfield Apartments of Clover, LP
TEC Builders, Inc.
The Meadows Apartments, LP
Thomas Beckman
Timber Ridge Apartments of McCormick, LP
Toler's Cove Homeowners' Association, Inc.
Town & Country Apartments of Lexington, LP
V.P. LP d/b/a Super 8 Motel
Victor Apat, individually and in behalf of R & A Partners
Village Station Apartments, LP
W.O. Powers, Deerfield Run of Rockhill, LLC, and
Huntington Place, Inc.
Wedgewood Associates of St. Stephen, LP
West End Manor Apartments of Union, LP
Westchase, LP
Westwood Apartments of Spartanburg, LP
William Taylor
Williamston Townhouse Apartments, LP
Williston Properties, LP
Windsor Shores Apartments, LP
Winfield Apartments, LP
Woodcreek Apartments of Simpsonville, LP
Woodlawn Apartments of Union, LP
Woodruff Arms Apartments, Ltd.
York Townhouses, LP

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	ix
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
A. Factual Background	3
B. Proceedings In The Trial Court	7
C. The South Carolina Supreme Court's Decision	8
REASONS FOR GRANTING THE WRIT	9
I. Proceedings Which Lack Constitutional Due Process Are Not Entitled To Full Faith And Credit	10
A. A Subsequent Court Is Entitled To Make Its Own Determination Of Whether The Prior Court Had Jurisdiction	12
B. As Petitioners Did Not Appear In The Foreign Action, They Remain Free To Challenge Jurisdiction In This Proceeding	13
C. This Court Is Not Bound By Unsupported Recitals In A Foreign Court's Decree	13
D. Tennessee Law Requires Proof Of Jurisdiction	14

TABLE OF CONTENTS – Continued

Page

E. Jurisdiction Was Not Fully And Fairly Litigated In *Cox* Or *Spencer*; Petitioners Did Not Receive Notice And Were Not There To Litigate; And, Objectors' Counsel Were Paid To Withdraw Their Objections .. 15

II. Substantive Review Upon Collateral Attack Is Proper 16

III. Jurisdiction For A National Class Action Conducted In State Court Requires Personal, Constitutionally Sufficient, Notice 17

A. Notice To Non-Resident Absentees Must Be Constitutionally Sufficient 18

B. Personal Notice May Not Be Compromised In The Name Of Judicial Economy Or Because Of Prohibitive Cost 18

C. The *Cox* Record Does Not Reflect Constitutionally Sufficient Notice 19

D. The Contents Of The Notice Were Deficient; There Was Not Complete Disclosure 20

E. The Respondents Failed To Notify Class Members Contained In Their Own Databases 21

F. The South Carolina Petitioners Did Not Receive Notice Of *Cox* And *Spencer* And Are Not Bound By The Unsupported Recitals Of Jurisdiction In The *Cox* And *Spencer* Decrees 22

G. Class Counsel Misled The *Cox* Court As To The Required Notice 22

TABLE OF CONTENTS – Continued

Page

H. The Notice Provided In *Spencer* Was Not Constitutionally Sufficient 22

IV. Adequacy Of Representation Requires Strict Adherence To Rule 23 Criteria, Appropriate Use Of Subclasses, And Appropriate Conduct By Class Representatives 23

A. Shared Exposure, Fairness, And A Claims Regime Do Not Satisfy The Commonality And Predominance Requirements; Conflicts Require Subclasses, Even During Settlement 23

B. A Disabling Conflict Of Interest Between Class Counsel And Class Members Renders The Representation Per Se Inadequate 24

C. *Cox* Failed To Assure Adequate Representation For Disparate Groups 25

D. Conduct Of Class Counsel Indicates Inadequate Representation 26

E. The Respondents Failed To Demonstrate Due Process As To Future Or Exposure-Only Petitioners 27

F. The *Spencer* Representation Was Inadequate 28

V. Denial Of Class Certification Illustrates The Due Process Deficiencies In *Cox* And *Spencer* .. 29

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) ..... *passim*

Amstadt v. United States Brass Corporation, 39 Tex. Sup. Ct. J. 351, 919 S.W.2d 644 (1996) 4

Benham v. Fisher, 650 S.W.2d 759 (Tenn. Ct. App. 1983) 14

Burnham v. Superior Court of California, 495 U.S. 604 (1990) 12

Colonial Pacific Leasing Corp. v. Taylor, 326 S.C. 529, 484 S.E.2d 595 (Ct. App. 1997) 13

Durfee v. Duke, 375 U.S. 106 (1963) 13

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 17, 18, 19, 21, 22

Epstein v. MCA, 179 F.3d 641 (9th Cir. 1999) 3, 9, 16

Fine v. AOL, Inc., 743 N.E.2d 416 (Ct. App. Ohio 2000), *cert. denied*, 532 U.S. 942 (2001) 9

G.M. Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996) 21

Hansberry v. Lee, 311 U.S. 32 (1940) 11, 17

Hanson v. Denckla, 357 U.S. 235 (1958) 12

Hart v. Tourte, 10 S.W.3d 263 (Tenn. Ct. App. 1999) 14

International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 11

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982) 10, 12, 14, 15

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 11

TABLE OF AUTHORITIES – Continued

Page

Martin v. Wilks, 490 U.S. 755 (1989). 11

Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367 (1996) 10, 24

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 17, 18

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 3, 16, 24, 27

Pennoyer v. Neff, 95 U.S. 714 (1877) 12

Peoples Nat'l Bank of Greenville v. Manos Bros., Inc., 226 S.C. 257, 84 S.E.2d 857 (1954) 13, 14

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*

Premium Inc. Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (1984) 21

Richards v. Jefferson County, 517 U.S. 793 (1996) 11

State v. Am. Family Mutual Ins. Co., 106 S.W.3d 483 (Mo. 2003) 9

State of Vermont v. Homeside Lending, Inc., 826 A.2d 997 (Vt. 2003) 3, 9, 16

Stephenson v. Dow Chemical Co., 273 F.3d 249 (2nd Cir. 2001) 3, 9, 16, 27

Williams v. North Carolina, 325 U.S. 226 (1945) 12, 13, 14, 22

OTHER AUTHORITIES

Art. III, Sec. II, United States Constitution 1

Restatement (Second) of Conflict of Laws § 104 (1969) 12

TABLE OF AUTHORITIES – Continued

Page

The Full Faith and Credit Clause, 28 U.S.C. § 1738 ..... *passim*

The Fourteenth Amendment to the United States Constitution 1, 15

28 U.S.C. § 1257(a) 1

U.S. S. Ct. Rule 10 1

PETITION FOR WRIT OF CERTIORARI

Hospitality Management Associates, Inc., et al. respectfully pray that this Court grant a writ of certiorari to review the judgment of the South Carolina Supreme Court entered in this case on January 12, 2004, which dismissed Plaintiffs' claims based on the granting of full faith and credit to class action settlements enrolled by other state courts.

OPINIONS BELOW

The order of the Court of Common Pleas, Charleston County, South Carolina (App. at 28a) is unreported. The opinion of the South Carolina Supreme Court (App. at 1a), sought to be reviewed, is reported at *Hospitality Management Associations, Inc. v. Shell Oil Company*, 356 S.C. 644, 591 S.E.2d 611 (2004).

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 12, 2004. The jurisdiction of this Court is invoked under Art. III, Sec. II, United States Constitution, 28 U.S.C. § 1257(a), and U.S. S. Ct. Rule 10.

FEDERAL PROVISION INVOLVED

The Full Faith and Credit Clause, 28 U.S.C. § 1738, is reproduced in its entirety at App. 64a. The Fourteenth Amendment to the Constitution (the "due process clause") is reproduced in its entirety at App. 65a.

STATEMENT OF THE CASE

This case raises an important and recurring question regarding the full faith and credit treatment to be accorded to national class action settlements occurring in state court. Circuit and state courts of last resort are in conflict as to the answer. The conflict centers on the scope of review to be utilized by a second court when reviewing the class action court's assertion of jurisdiction over non-resident class

members, when determining whether to accord the earlier class action settlement full faith and credit ("FFC"). As noted by the South Carolina Supreme Court ("SCSCT"), "there are important policy considerations favoring both limited and broad collateral review." However, the SCSCT went on to favor judicial efficiency over jurisdiction and due process. Judicial efficiency, while a laudatory goal, never trumps due process.

The SCSCT, in direct conflict with the Second Circuit and with this Court's Order in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), granted full faith and credit to foreign class judgments with no regard for due process and jurisdiction. (*See* App. at 27a). The SCSCT ruled that the second court is limited to a review of whether there was a procedure in place in the issuing court to protect class members' rights; not whether the procedure was actually utilized or performed its function. If the decision of the SCSCT is allowed to stand, any court in the nation can bind non-resident class members to a national settlement, regardless of the actual notice given or adequacy of representation provided, by simply inserting conclusory recitals regarding notice, jurisdiction, representation, and fairness without regard to whether the court's conclusions are supported by the record.

The undisputed facts presented by the underlying litigation in this case afford this Court the prime opportunity to address this issue. The clear facts of the underlying case show, *inter alia*: 1) that personal notice was not given to known class members; 2) that class counsel operated under multiple disabling conflicts of interest, including withdrawing objections to a competing class settlement in consideration of the payment of additional attorney fees and the settlement of their private inventory of claims at amounts greatly disparate to that which class members received.

This Court has always mandated strict adherence to the due process rights of litigants. In the context of a class action, due process requires notice, an opportunity to participate or opt-out, and adequate representation at all times. The only reasonable avenue for an absent class

member to test whether due process has been accorded is through collateral attack. Review by a subsequent court will be rendered meaningless under the SCSCT decision which exalts form over substance.

This petition is an opportunity for this court to clarify whether the due process principles of *Shutts*, *Amchem*, *Ortiz*, *Stevenson* and *Vermont*, (*see infra*) or whether the superficial procedural review espoused by the Ninth Circuit in *Epstein III*, should be the law of the land.

A. Factual Background

The facts in this lawsuit present a scenario that could arise in any class action settlement where defendants intend to extinguish the rights of class members at minimal expense to the parties.

Petitioners are owners of structures containing polybutylene plumbing systems. Petitioners allege that the Respondents' development and marketing of polybutylene plumbing systems, and manufacturing and distribution of the resin from which the plumbing systems were made, known by the Respondents to be unfit for their intended use, caused damage to Petitioners.

In 1977, Shell acquired a polybutylene plastic resin business and worked to develop a polybutylene based plumbing system intended to capture a large share of the residential market from the copper based systems which had dominated the market for many years. The system was marketed as an alternative to copper plumbing on the basis that the system was lightweight, inexpensive, better able to withstand freezing temperatures, easier to install than copper systems, and that it would last fifty years.

Polybutylene plumbing systems are described as follows:

> The plumbing system used flexible plastic pipes made of polybutylene resin connected by fittings made of a plastic compound called Celcon. The pipes and fittings were joined together by a copper or aluminum crimp ring placed around the

> outside of the pipe at the point where the pipe and fitting were connected. The ring, fitting, and pipe were then compressed using a large wrench-like tool designed by U.S. Brass. The pressure from the crimp ring deformed the pipe and fitting, creating a water-tight seal.
>
> Celanese manufactured Celcon and supplied Celcon pellets to U.S. Brass to be molded into fittings . . . Shell produced the polybutylene resin and provided it in raw form to U.S. Brass.

Amstad v. United States Brass Corporation, 39 Tex. Sup. Ct. J. 351, 919 S.W.2d 644 (1996) (negligence verdicts upheld against Shell and Celanese, but Deceptive Trade Practice verdicts reversed). Shell played a pivotal role in securing building code approvals throughout the United States. *Id.* Shell and Celanese each knew of the defective nature of the product at the time they developed the national market for the product.

Like Celanese, DuPont manufactured an acetal resin called Delrin, which was molded into fittings for use in polybutylene plumbing systems. The manufacturer(s) which converted the resin to piping and pipe fittings ended up in bankruptcy.

The principal source of the failures is "stress corrosion cracking." Chlorine and other chemicals and metals commonly found in drinking water, and/or the presence of heat, neutralize a stabilizer element contained within the polybutylene piping. The destabilization leads to microscopic pin holes. Stress accelerates the deterioration of the pipe and causes leaking. The pipe and fittings are stressed at installation by both crimping and bending.

Just prior to this South Carolina action being filed in May 1995, an Alabama court preliminarily approved and certified a national settlement and settlement class against DuPont (the "*Spencer*" action). Thereafter, the *Spencer* plaintiffs moved for certification of a national trial class against Shell and Celanese. The *Spencer* certification motion was set to be heard on June 28, 1995. Defendants and competing plaintiffs' counsel, concerned that the

Spencer action would eclipse their settlement efforts, filed a national class action against Shell and Celanese in a rural Tennessee county on June 13, 1995 (the "*Cox*" action). The filing in Tennessee was obviously the product of forum shopping. On the same day, the Tennessee action was certified as a national class action.[1] This is commonly referred to as a "drive-by class action."

An all-out war and race to the courthouse occurred between the competing national class actions. *Spencer* class counsel filed objections to the *Cox* settlement, which was a slightly revised version of a settlement that had been twice rejected by courts in Texas, claiming the settlement was inadequate. *Spencer* class counsel sought and received a November 27, 1995 trial date. In the face of this, the *Cox* parties consummated a settlement in July of 1995 and rushed through preliminary court approval of the settlement, a notice program, opt-out period, and fairness hearing. However, as of several weeks before the *Cox* fairness hearing, there were hundreds of thousands of Claimant opt-outs from the *Cox* class action, many of whom were clients of *Spencer* class counsel. (App. 95-98a). The competing class actions mediated in California.

California mediation resulted in a joint national settlement achieved through increased attorneys' fees. To save the deals, Shell and Celanese agreed to pay *Spencer* class counsel $30,000,000 in fees to withdraw their objections to *Cox*. (App. 100a). *Spencer* counsel agreed to contribute its $120,000,000 Dupont recovery to the *Cox* fund; and Shell and Celanese agreed to increase the *Cox* fund by $100,000,000, *i.e.*, $20,000,000 dollars less than the $120,000,000 the *Cox* fund was getting from *Spencer*. *Id.* In other words the net change was that the total settlement fund was reduced by $20,000,000 and the

[1] Defendants acquiesced to the Tennessee class certification without objection, failed to file any responsive pleadings, failed to move for de-certification, and failed to conduct any discovery. In contrast, Defendants filed a writ of mandamus in *Spencer* to reverse the class certification.

attorneys' fees were increased by $30,000,000. The settlement provided few protections for the class members and provided a financial incentive to the Respondents to discourage the proper resolution of claims. The settlement equated to a per unit settlement of less than $150.00,[2] notwithstanding the Respondents' admissions that the average cost of a replumb was approximately $4,100.00. (App. 89-95a). No discovery on the merits ever occurred in either *Cox* or *Spencer*.

Simultaneous with the national settlements, Respondents settled the individual claims of class opt-outs at greatly disparate amounts. The lead member of the *Spencer* class counsel settled his 110,000 claims by forcing 50,000 of his clients to opt back into the *Cox* settlement and procured replumbs for the remaining 60,000 clients *plus* $170,000,000 in cash ($2,833.33 per unit in addition to having their property replumbed.) (App. 104a-110a).

Personal notice of the proposed settlement and of the class members' right to appear, object, or opt-out was not timely had or widely made. The only individualized notice that was provided was to mobile home owners and other persons who happened to learn of the settlement through the media and then requested information. Known claimants listed in the Respondents' own database were not give notice of the settlement. (App. 88). The class representatives in *Cox* and *Spencer*, who were mobile homeowners, made no effort to personally notify owners of multi-unit complexes or site-built homes. No subclasses were utilized. As notice was given prior to the Monterey settlement, no notice of the revised terms or assignments were given to class members.

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[2] The national class was believed to contain 6 million polybutylene plumbing units. The settlement for the 6 million units was allegedly for the sum of $950 million. (App. 100a).

B. Proceedings In The Trial Court

The instant action was filed as a class action in May of 1995 prior to *Cox* being filed or certified as a national class. The threat of class action litigation in South Carolina led the Respondents to agree to advantageous settlements for the original South Carolina plaintiffs, in excess of $25,000.00 per residential unit, in an effort to end the South Carolina class, leaving the remaining unnamed claimants without a remedy. Petitioners thereafter intervened.

Respondents filed dispositive motions in 1997, arguing that the South Carolina action was barred by FFC. Petitioners opposed these motions on the grounds that they were not accorded the due process guaranteed by the United States Constitution in the foreign proceedings: that they were not notified of the pendency of the foreign actions; therefore, they had no opportunity to appear, to participate, or to exclude themselves from the foreign actions. Petitioners further asserted that the foreign courts' recitals of jurisdiction do not bind or limit the South Carolina Court's inquiry and the foreign courts' records do not substantiate their jurisdictional findings. Petitioners additionally assert that even if the notice was not defective, Petitioners' due process rights were violated by the inadequate representation in the national classes.

In an order issued in 1997, the trial court declined to extend full faith and credit to the foreign court orders based on a number of different shortcomings that appeared in those proceedings.

Petitioners thereafter filed a motion to certify a class. The trial court denied class certification, finding that polybutylene plumbing claims were unsuitable for class treatment, not withstanding class treatment in *Cox* and *Spencer*. After denying the class certification, the Court granted Plaintiffs leave to join additional claimants, which they did.

In 2001, the Defendants renewed their dispositive motions based on the doctrine of FFC. No new evidence was submitted by the Defendants. Plaintiffs filed additional evidence relating to questions raised by the trial

judge in the prior Order denying FFC. Although the Respondents proffered no new evidence, the trial court granted the Respondents renewed motions for FFC in 2002, without a hearing. (App. 28a).

Plaintiffs appealed the Order granting FFC and the Order Denying Class Certification to the SCSCT. This appeal was rejected by decision dated January 12, 2004, affirming the trial court.

C. The South Carolina Supreme Court's Decision

The SCSCT in its opinion noted the importance of the two competing interests at stake in this case: an absent class member's right to due process (and his day in court) versus society's interest in the finality of class action judgments. In the end, the SCSCT weighed in heavily in favor of the finality of class action judgments by severely circumscribing the scope of review that a subsequent court may engage in when considering whether the earlier court had jurisdiction over absent class members.

The SCSCT considered most of the relevant precedent but then ignored it. Nowhere is this more apparent than in its consideration of *Amchem*. After correctly noting the meaning of *Amchem*, the SCSCT went on to completely ignore *Amchem*'s holding.

In straining to reach its desired result, the SCSCT also misinterpreted and ignored important facts. It mischaracterized the fee deal which caused the withdrawal of objections to each of the competing class actions, and failed to recognized that the eventual joint settlement of the competing class actions resulted in a lower gross settlement; and that this reduction in gross settlement is what funded the additional attorney fees. It also failed to consider that the parties failed to provide personal notice to claimants known to Respondents. The SCSCT also ignored the conflict posed by the contemporaneous settlement of class counsel's inventory of claims at greatly disparate amounts.

REASONS FOR GRANTING THE WRIT

Supreme Court review is essential to correct the misapplication of this Court's decision in *Amchem* and to eliminate the conflict among the federal circuits and state courts of last resort as to issues of due process and jurisdiction. The Second Circuit has noted a conflict on this very issue between it and the Ninth Circuit. *See Stevensen, infra*. The Court of Appeals of Ohio has adopted the Ninth Circuit's approach.[3] The Supreme Court of Vermont has ruled in accordance with the Second Circuit's analysis.[4]

The SCSCT has now effectively adopted the Ninth Circuit's interpretation of the proper scope of collateral review that eliminates any meaningful avenue to challenge the conduct of class counsel.[5] If permitted to stand, the decision below will allow class action litigants to obtain the preclusive effect of full faith and credit without regard to whether jurisdiction was properly invoked or maintained in the underlying action.[6]

No judicial precedent of this Court allows the SCSCT to compromise the due process rights of litigants and the requirement of jurisdiction in favor of the modern class action settlement in the name of judicial efficiency.

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[3] *Fine v. AOL, Inc.*, 743 N.E.2d 416 (Ct. App. Ohio 2000), *cert. denied*, 532 U.S. 942 (2001).

[4] *State of Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (adequacy of representation is the quintessence of due process in class actions). *See also, State v. Am. Family Mutual Ins. Co.*, 106 S.W.3d 483, 493-4 (Mo. 2003) (concurring opinion discussing limits on asserting jurisdiction over non-resident class members).

[5] *Epstein v. MCA*, 179 F.3d 641 (1999) (*Shutts* does not support broad collateral review; due process only requires the certifying court to adopt appropriate procedures) ("*Epstein III*"), *cert. denied*, 528 U.S. 1004 (1999). Notably, one of the three judges dissented from the Ninth Circuit decision.

[6] The only avenue left will be for non-residents to travel to the foreign jurisdiction and hire counsel, an expensive and onerous proposition, which will often be time-barred.

I. Proceedings Which Lack Constitutional Due Process Are Not Entitled To Full Faith And Credit

A class decision without jurisdiction over an absent party is not entitled to full faith and credit and has no res judicata effect as to that party. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("*Shutts*").

> A [class] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party.

472 U.S. at 805. As stated in, *Kremer v. Chemical Const. Corp.* 456 U.S. 461, 480-1 (1982):

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue . . . 'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'

Res judicata or claim preclusion is subject to the same limitation. *Id.* at note 22.

> . . . A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.

Id. at 482.

The mandate of *Kremer* was reiterated fourteen years later in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996) ("*Matsushita*"):

> Every state's law on the preclusiveness of judgments is pervasively affected by the supreme law of the land. To be valid in the rendition form, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the 14th amendment's due process clause.

116 S.Ct. at 888 (Ginsburg, J., concurring and dissenting).

Due process requires that absent class members receive notice; that absent class members be given a meaningful opportunity to participate and opt-out; and that the representation be adequate at all times:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt-out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry*, 311 U.S. at 42-43, 45, 85 L.Ed. 22, 61 S. Ct. 115, 132 ALR 741.

Shutts, 472 U.S. at 812.

Full faith and credit does not override the basic precept of due process that "[a] judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). A person "is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (citation omitted); *see also International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement").

The comity underlying the full faith and credit obligation has always been understood to be "subject to the requirements of . . . the Due Process Clause." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). A party deprived of a "full and fair opportunity to litigate the claim or issue" cannot be bound under either 28 U.S.C. § 1738 or the Full Faith and Credit Clause

because the party would not and could not be bound by the judgment even in the state in which it was rendered. *Kremer v. Chemical Constr. Corp.*, 456 U.S. at 480-81 (internal quotation omitted). "In such a case, there could be no constitutionally recognizable preclusion at all." *Id.* at 482-83.

Accordingly, it is well settled that a "judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 805; *see also Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945); *Restatement (Second) of Conflict of Laws* § 104 (1969) ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states."). *Pennoyer v. Neff*, 95 U.S. 714, 727, 729-33 (1877) (Oregon state-court judgment against California resident was void for lack of personal jurisdiction); *Burnham v. Superior Court of California*, 495 U.S. 604, 608 (1990) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books . . . ").

A. A Subsequent Court Is Entitled To Make Its Own Determination Of Whether The Prior Court Had Jurisdiction

The framers of the Constitution interjected the domestication of foreign judgments as a prerequisite to a state granting full faith and credit so that each state could protect its sovereignty and citizens; for an order to be entitled to domestication, the foreign court must have had the power, *i.e.*, the jurisdiction, to render the judgment. *See Williams v. North Carolina*, 325 U.S. at 229 (Nevada divorce decree was not granted full faith and credit and

did not prevent North Carolina from prosecuting defendant for bigamous marriage). Upon proper averments regarding the foreign court's lack of jurisdiction, the court has the duty to inquire into the jurisdictional underpinnings of the foreign decree. *See Durfee v. Duke*, 375 U.S. 106, 116 (1963).

B. As Petitioners Did Not Appear In The Foreign Action, They Remain Free To Challenge Jurisdiction In This Proceeding

If the challenging party *appeared* in the foreign court to contest jurisdiction, *and* if personal jurisdiction was or could have been litigated in the foreign court, the subsequent court will be bound by the foreign court's determination of jurisdiction. However, if the challenging party never appeared in the first action, the issue of jurisdiction, by definition, could not have been fully and fairly litigated – one party was absent. *Colonial Pacific Leasing Corp. v. Taylor*, 326 S.C. 529, 484 S.E.2d 595, 597 (Ct. App. 1997) (defendant who appeared in Oregon action could not later challenge jurisdiction in South Carolina enrollment action). *See also Durfee v. Duke*, 373 U.S. at 110-12 (foreign court's determination of jurisdictional issue only entitled to full faith and credit where one actually appears and litigates the issue).

C. This Court Is Not Bound By Unsupported Recitals In A Foreign Court's Decree

Recitals in a foreign order are not binding on courts reviewing jurisdictional questions. *Williams v. North Carolina*, 325 U.S. at 230 (state not bound by unfounded or collusive recitals in foreign court order); *Peoples Nat'l Bank of Greenville v. Manos Bros., Inc.*, 226 S.C. at 276, 84 S.E.2d at 867 (testimony showed that the Georgia court's finding of jurisdiction was erroneous). A judicial decree is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded. *Williams v. North Carolina*, 325 U.S. at 232. A foreign court cannot avoid review of its "disposition of a constitutional claim by

casting it in the form of an unreviewable finding of fact." *Id.* at 236.

A recital does not control the later court's inquiry as to jurisdiction:

> Such recital is, of course, not conclusive of the jurisdictional issue in the courts of another state. *Williams v. North Carolina*, supra. The recital of service is belied by the evidence here.

Peoples Nat'l Bank, 84 S.E.2d at 867. The *Williams* court stated:

> On the contrary, it is open to the courts of any state in the trial of collateral issue to determine upon the evidence produced the true domicile of the deceased.

Williams, 325 U.S. at 230-1. The requirement that one state examine another state's jurisdictional underpinnings prior to granting full faith and credit to its judgment is meant to ensure that other states exercise their "reciprocal duty of respect" owed to each state by each other so that the foreign states will not be tempted to exceed their jurisdiction by exercising jurisdiction over matters to which they do not truly have jurisdiction. *Id.* 325 U.S. at 233. Here, the Petitioners are entitled to look behind the *Cox* and *Spencer* courts' self-serving jurisdictional recitals to determine whether the recitals are supported by the record.

D. Tennessee Law Requires Proof Of Jurisdiction

Tennessee law regarding the grant or denial of full faith and credit to foreign judgments is in accord. A party is entitled to contest the personal jurisdiction of the foreign court prior to the foreign decree being enrolled. *Benham v. Fisher*, 650 S.W.2d 759 (Tenn. Ct. App. 1983). If there are questions of fact regarding the foreign court's jurisdiction, the party asserting the foreign decree is not entitled to summary judgment. *Hart v. Tourte*, 10 S.W.3d 263, 268 (Tenn. Ct. App. 1999). In considering summary judgment on full faith and credit, allegations of the non-moving party must be taken as true. *Id.* More importantly, as noted in *Kremer*, because of the guarantee of due

process under the Fourteenth Amendment, the Tennessee and Alabama courts are prohibited from giving credit to a constitutionally infirm judgment, even from their own courts. *Kremer*, 456 U.S. at 482-3.

E. Jurisdiction Was Not Fully And Fairly Litigated In *Cox* Or *Spencer*; Petitioners Did Not Receive Notice And Were Not There To Litigate; And, Objectors' Counsel Were Paid To Withdraw Their Objections

Petitioners did not receive timely notice of the *Cox* and *Spencer* proceeding; they were therefore not even capable of appearing or participating in the proceeding. Since Petitioners did not participate in *Cox* and *Spencer*, Petitioners have obviously not had the opportunity to litigate whether they were subject to the jurisdiction of the Obion foreign County Court. Furthermore, the issue of jurisdiction was not litigated in *Cox* and *Spencer*; in fact, no litigation occurred at all as all objectors were bought off. There were no objectors present at the *Cox* and *Spencer* fairness hearings.[7]

Various parties in the *Cox* proceeding raised objections to the DuPont settlement. As part of their agreement to pay $30 million in attorneys' fees to the *Spencer* objectors to induce them to drop their *Cox* objections, the *Cox* parties also agreed to withdraw any objections they had previously lodged against the DuPont settlement in the *Spencer* court. Concomitantly, *Spencer* counsel withdrew their objections to the *Cox* settlement. Skullduggery should not preclude Petitioners from having their day in court.

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[7] At the *Cox* hearing, several claimants did comment briefly on the settlement. At the two hour *Spencer* fairness hearing, there were no witnesses at all.

II. Substantive Review Upon Collateral Attack Is Proper

The propriety and breath of collateral attack was recently reviewed by the Second Circuit. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2nd Cir. 2001), affirmed by evenly decided court, 539 U.S. 111 (2003). In *Stephenson*, plaintiffs alleged that they were injured by exposure to Agent Orange while serving in the military in Vietnam. In the late 1990s, Stephenson and Isaacson filed lawsuits against manufacturers of Agent Orange. Plaintiffs contended that they were inadequately represented and, therefore, due process considerations prevented the earlier class action settlement from precluding their claims. The Second Circuit agreed.

After finding that collateral attack was appropriate, the *Stephenson* court proceeded on to examine the adequacy of representation under the precedent set forth in *Amchem* and *Ortiz* (discussed *infra*). The court found that there was not adequate representation and held that the Petitioners were not bound by the prior global settlement.

The court in *State of Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (VT 2003), relied on *Shutts* in taking a similar approach as the Second Circuit in *Stephenson*. The Vermont Court found that jurisdiction over absent class members had not been established or maintained for three independent reasons, including inadequate disclosure in the notice and inadequate representation. The Vermont Court rejected the narrow holding of *Epstein III* and conducted a substantive review of the Alabama Court's compliance with the *Shutts* jurisdiction criteria.

Notably, the Vermont court found that even applying *Epstein III*, the settlement court lacked jurisdiction as the Ninth Circuit allows a more detailed review of the adequacy of representation where the defendant knows of the inadequate representation. In *Vermont*, the court found that the defendant in the Alabama case, Bank Boston, had to have known that class counsel wore exaggerating class benefits and/or were in an antagonistic position vis-a-vis their client, the class.

In *Cox* and *Spencer*, the inadequate representation would fall under the Ninth Circuit exception. The defendants participated in, inter alia, the compromise of objections for additional attorney fees, the lowering of the settlement fund to pay for the attorney fees, and the settlement of the private inventory of claims at greatly disparate amounts.

Thus, it was error for the SCSCT to adopt the Ninth Circuit analysis which runs contra to Shutts. However, even otherwise, it was error for the SCSCT to fail to recognize the exception for inadequate representation in which the defendant participates.

Note the forewarning of *Shutts*:

> . . . the only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

472 U.S. at 805. The SCSCT ruling that the record is irrelevant, that only the recitals matter, is not in accordance with *Shutts*.

III. Jurisdiction For A National Class Action Conducted In State Court Requires Constitutionally Sufficient Notice

A line of U.S. Supreme Court cases have established the essentials of due process in class actions: *Hansberry*, *Mullane*, *Eisen*, and *Shutts*, *infra*. The *Mullane* court, relying on *Hansberry*, ruled that personal notice, must be given if the names and addresses of the person affected can be ascertained. The *Eisen* Court ruled that personal notice may not be compromised because the cost of notice is prohibitive. *Shutts* confirmed that *due process* requires that absent class members be given actual notice; that the notice must provide absent class members a meaningful opportunity to participate and opt-out; and that the class representation be adequate at all times.

A. Notice To Non-Resident Absentees Must Be Constitutionally Sufficient

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313. The Court noted that *the right to be heard has little value unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest. Mullane*, 339 U.S. at 314 (emphasis supplied). Citing *Mullane*, *Shutts* set forth that:

> The notice must be the best practicable, further reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Shutts, 472 U.S. at 812.

B. Personal Notice May Not Be Compromised In The Name Of Judicial Economy Or Because Of Prohibitive Cost

In *Eisen*, the Court ruled that class representatives may *not* compromise the notice requirement of due process in light of the cost of notice or potential recovery. The lower court attempted to fashion a program based partially upon individual notice and partially upon notice by publication. The high court overturned, ruling that absent class members are entitled to the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. Citing *Mullane*, the *Eisen* Court stated:

> [I]ndividual notice to identifiable class members is not a discretionary consideration to be waived

> in a particular case. It is, rather, an unambiguous requirement of Rule 23.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

> There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.

Eisen, 417 U.S. at 176 (footnote omitted). The *Eisen* court concluded as follows:

> We therefore conclude that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

Eisen, 417 U.S. at 177 (footnote omitted).

C. The *Cox* Record Does Not Reflect Constitutionally Sufficient Notice

A review of the record in *Cox* reveals a deficient notice program. The only claimants who were targeted with personal notice were mobile home owners. The mobile home notice was mailed halfway through the opt-out period.

The class representatives in both *Cox* and *Spencer* failed to determine which other class members were identifiable for personal notice. The reason for their failure is obvious: identifying and noticing class members takes time and money and the competing class counsel were in a race to the courthouse; furthermore, class counsel misunderstood the law in this regard as evidenced by their representations to the court; lastly, proper notice would cost more *and* increase the number of claims against the Respondents.

At no point did Shell or any plumbing supplier contact known consumers of polybutylene products, e.g., contractors, to personally notify them of the settlement to obtain from them the available identities of other class members. (App. 68a & 80a). Certainly if Shell can market its product to contractors and suppliers, it can be expected to make the effort to make a phone call or send a letter to plumbing suppliers and master plumbers to learn the identity of

class members which resulted from Shell's marketing activity. (App. 67a-71a).

As detailed at length in affidavits of media experts, contractors, and plumbers, the *Cox* multimedia notice program were poor and ineffective; and very little of it actually took place in South Carolina.

D. The Contents Of The Notice Were Deficient; There Was Not Complete Disclosure

With regards to the content of the notice that was given, i.e., the failure to make complete and adequate disclosure, the notices failed to disclose:

1. That class members would be required to assign to the Respondents their rights to a one hundred and twenty million dollar settlement.

2. That the alleged increased settlement fund was being funded through the *Spencer* counsel's acquiescence to assignment of claims.

3. That the Respondents in *Cox* had persuaded thousands of objectors to drop their objections by the payment of disparate settlements, including 170 million dollars in cash.

4. That the Respondents in *Cox* had persuaded the *Spencer* class counsel to drop their objections to the settlement by paying them an additional $30 million in attorney fees.

5. That the settlement included assignment of any claim they may have against the U.S. Brass bankruptcy estate.

6. That the settlement amount of $950 million was not even remotely commensurate with prior jury verdicts and settlements.

7. That the remedy being proposed in the settlement was substantially less valuable than that which was previously being provided by the Respondents voluntarily through the Plumbing Claims Group ("PCG") App. 72a-78a; and,

> 8. That settlement created an adversarial system with incentive for Shell and Celanese to deny claims and/or limit the quality of replumbs. (App. 72a-78a).

Class counsel are fiduciaries to class members and must provide complete disclosure of all material settlement terms to class members. *G.M. Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996); *Accord*, *Premium Inc. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (1984). A class action settlement notice must contain the maximum amount of attorneys' fees sought by counsel and specify the proposed method of calculating the award. *GMC v. Bloyed*, 916 S.W. 2d 949 (Tex. 1996). The source of the fee, whether paid out of the common fund or paid separately by the defendant, is irrelevant. The class action settlement, including both the benefits to the class and the fees awarded to counsel, represented a total dollar value that the Respondents were willing to pay to avoid litigation. *Id.* at 957-958.

E. The Respondents Failed To Notify Class Members Contained In Their Own Databases

As noted in the July 1998 Order denying FCC, the failure to notify known Claimants in their own databases is a glaring example of the defective nature of the entire notice program:

> [T]his court is concerned with the allegations that certain plaintiffs were readily ascertainable. . . . Despite defendants' possession of the PCG database, defendants were unable to produce any evidence that timely notice was sent to persons in the PCG database.

When Petitioners are individually known to Respondents, Respondents cannot avoid giving individual notice or publication. *Eisen*, 417 U.S. at 176-7.

F. The South Carolina Petitioners Did Not Receive Notice Of *Cox* And *Spencer* And Are Not Bound By The Unsupported Recitals Of Jurisdiction In The *Cox* And *Spencer* Decrees

Petitioners never received notice of and never appeared in *Cox* nor *Spencer*. Since they did not appear, they are free to challenge the jurisdiction of the predecessor court in a later proceeding when the Respondents seek to assert res judicata, jurisdictional recitals notwithstanding. The *Cox* Order merely recites that the court has jurisdiction. Under *Williams* this is not sufficient. Because Petitioners in this action never received notice of *Cox* and *Spencer*, they are not bound by the jurisdictional decrees therein.

G. Class Counsel Misled The *Cox* Court As To The Required Notice

Class counsel misled the *Cox* court as to the meaning of the U.S. Supreme Court's holding in *Eisen* when it represented to the *Cox* court: "that cost-effective notice is not only a goal, it's a requirement." August 30, 1995, hearing at 38. This is a complete misstatement of the holding in *Eisen* and typical of the approach which led to the deficient notice program in the *Cox* proceeding.

H. The Notice Provided In *Spencer* Was Not Constitutionally Sufficient

At the *Spencer* full faith and credit hearing, there was no testimony taken and there were no objectors present. Like *Cox*, all the *Spencer* objectors had been bought off. Personal notice was only targeted at mobile home owners.

Like *Cox*, the *Spencer* record evidences absolutely no effort to ascertain the identity of any class members outside of the mobile home list procured from state tax authorities. There is no evidence in the record as to whether or not other members of the class could be identified with reasonable effort and given personal notice. And there was not personal notice to the claimants in Dupont's data base.

IV. Adequacy Of Representation Requires Strict Adherence To Rule 23 Criteria, Appropriate Use Of Subclasses, And Appropriate Conduct By Class Representatives

The U.S. Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), prevents full faith and credit from being be extended to *Cox* and *Spencer*. The Supreme Court ruled *inter alia* that: 1) subclasses must be used to align the interests of class members; 2) the certification of a settlement class requires increased scrutiny, not less; and, 3) if a class (or subclass) is not sufficiently cohesive, it may not be litigated by representation because the due process of the members cannot be adequately protected; and 4) a class (or subclass) must be represented by a plaintiff with similar claims. *Amchem*, 521 U.S. at 623.

A. Shared Exposure, Fairness, And A Claims Regime Do Not Satisfy The Commonality And Predominance Requirements; Conflicts Require Subclasses, Even During Settlement

In *Amchem*, the settling parties contended that the settlement's fairness was a common question, predominating over disparate legal issues that might be pivotal in litigation but became irrelevant under the settlement. The Supreme Court rejected this. *Amchem*, 526 U.S. at 621-2.

> The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, . . . [are] standards set for the protection of absent class members [which] serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Id., 526 U.S. at 621. Proposed settlement classes warrant more, not less caution on the question of certification. *Id.*, 526 U.S. at 620, n. 16. The *Amchem* Court further ruled that class representatives must represent classes or

subclasses which have typical claim and damage considerations. *Amchem*, 526 U.S. at 625-6.

Amchem further indicated that a settlement's failure to properly address and resolve the conflict of future claimants could be fatal:

> Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Amchem, 526 U.S. at 628.

B. A Disabling Conflict Of Interest Between Class Counsel And Class Members Renders The Representation Per Se Inadequate

Following a line of U.S. Supreme Court decisions, including *Amchem* and *Matsushita*, the U.S. Supreme Court, concluded that a conflict of interest between class counsel and the absent class members inhibits adequate representation. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).[8] Similar to what occurred in *Spencer* and *Cox* settlements, the *Ortiz* class counsel put their personal interest ahead of that of the class, in part by settling their private inventory of claims outside of the class settlement. *Ortiz* ruled that this was unacceptable. *Id.* at 855, 863. Here, we have two such violations: the separate settlement of Plaintiff's counsels' private inventory claims and the

[8] An adequate representative, vigorously prosecuting an action, without conflict, is a cornerstone of adequate representation. *Matsushita*, 116 S.Ct. at 889; *Shutts*, 472 U.S. 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.").

$30 million paid by *Cox* to *Spencer* counsel to drop their objections.

C. *Cox* Failed To Assure Adequate Representation For Disparate Groups

The *Cox* class representatives did not propose subclasses or advocate the class interest in such a way that the *Cox* court would have been able to comply with *Anchem's* mandate. The *Cox* court relied on the exposure commonality in certifying one class. The court never evaluated the adequacy of the named Petitioners to represent the diverse interests in the class, did not identify and compare the common and uncommon questions, and relied purely on conclusory recitals. The court's failure in these matters was a direct result of inadequate counsel.[9]

Petitioners have documented the inability of mobile home owner Plaintiffs, such as those in *Cox*, to represent the type of diverse, complex, commercial interests which most Petitioners represent. Subclasses were needed to differentiate between the different types of claimants, *i.e.*, mobile home versus site-built versus multi-family. Each different group of claimants has their own particular needs and problems. For instance, a replumb causes a homeowner inconvenience. A replumb causes an apartment owner loss of rent and potential relocation expenses.

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[9] *Amchem* clearly shows that the law regarding commonality provided to the *Cox* court by Shell on August 9, 1995, was incorrect:

> If you have a settlement, statute of limitations questions are governed by the settlement agreement. The law of all fifty states applies, which it would here in a trial class, no question about it, it's governed by the settlement agreement now. The relief to which the class is entitled is governed by the settlement agreement. So, you have a commonality of issues and a commonality of relief that otherwise you would not have. That's why when there's a settlement, there's a degree of typicality and commonality, that in a trial class you wouldn't have.

These provide for different considerations in a settlement. Moreover, owners of multi-unit complexes would favor a building-by-building replumb test as opposed to a unit-by-unit replumb test which would presumably satisfy a homeowner and is in fact what was included in *Cox*. (App. 77a). Multi-unit complexes also prefer to do their own work so as to mitigate their losses and minimize the disruption of their business.

After considering *Amchem*, the SCSCT expressly ignored *Amchem's* holding by ruling that the appearance of a fair procedure negates the need to conduct an *Amchem*-adequate representation analysis or use the subclasses required by *Amchem*. As the U.S. Supreme Court has ruled that adequacy of representation is part of the due process guaranteed under the Constitution, the SCSCT exceeded its authority in ruling otherwise.

D. Conduct Of Class Counsel Indicates Inadequate Representation

In addition to the above there are a few additional matters worth emphasizing. Class counsel's failure to attempt to quantify the size of the class or to identify its members for the purpose of notice and/or evaluation of claims, evidences an extreme deficiency of representation.

Class counsel not only failed to quantify the claims, but they also failed to value the class claims either individually or on a class-wide basis. Even the Respondents conceded that the average cost of replumb is at least $4,100.00 at the time. (App. 89a-95a). Attorney George Fleming claimed an average jury verdict and settlement per unit of $30,000.00-$40,000.00. (App. 111a). Moreover, even Shell had valued its share of the national liability at $7 billion. (App. 111a). Class counsel ignored this evidence in settling for $150.00 per unit. The act by plaintiffs' class counsel valuing the class claims at less than $1 billion is inexcusable, especially when every trial that had gone to verdict before the *Cox* settlement resulted in a verdict against the Respondents.

The act by class counsel in sending out an obviously defective notice which failed to disclose the $120 million DuPont assignment, and which failed to disclose the U.S. Brass assignment is further evidence of wrongful conduct. The evidence that *Cox* class counsel facilitated the efforts by the Respondents in the *Cox* case to buy off all objectors to the *Cox* class action for $30 million in attorneys' fees is simply the icing on the cake with regards to the conduct of class counsel.

E. The Respondents Failed To Demonstrate Due Process As To Future Or Exposure-Only Petitioners

As highlighted by the *Amchem* decision, and later in the *Ortiz* and *Stephenson* decisions, inclusion of future or "exposure-only" claimants in the class is problematic, if not impossible. "Exposure-only" claimants are persons who have been exposed to a problem but have not manifested the injurious symptoms such that they know they have been exposed. *Stephenson* found that the inclusion of future claimants who did not yet have claims evidenced such inadequate representation such that the later claimants were not bound by the prior class judgment.

The *Cox* and *Spencer* settlements have a similar inherent defect problem. There are many homeowners that have polybutylene pipe hidden behind their walls but do not know of its existence. (App. 70a-1a & 82a). It is therefore difficult, if not impossible, for these potential class members to understand that they are part of the class and that they need to protect their rights. Therefore, it is problematic, if not impossible, to provide due process to these persons. If it can be done, they need to be in a subclass with their own representatives. The conflict between current and future claimants in the polybutylene context is well illustrated by the settlement agreement reached. Although Shell marketed the polybutylene plumbing systems as having a fifty-year life span, the settlement only provides relief for the first ten to fifteen

years of that life span. This obviously favors current claimants at the expense of future claimants.

F. The *Spencer* Representation Was Inadequate

For the most part, the inadequate representation which occurred in *Spencer* was the mirror image of what was occurring in *Cox* during the final stages of the race for judicial approval of settlement. However, the *Spencer* class counsel had the ultimate disabling conflict. *Spencer* class counsel accepted $30 million in attorneys' fees from a non-client to drop their own clients' claims against Shell and Celanese, without prior disclosure or consent. Then likewise they failed to disclose this ransom payment to the absent class members. It has long been recognized that attorney's allegiance extends to his employer, the payor, and the acceptance of money from a non-client without the client's informed consent was a conflict of interest.

Respondents try to claim that the *Spencer* attorneys were paid $30 million for their contribution to the increased *Cox* settlement. However, the math just does not work. On the day before the *Cox* mediation, there was $970 million on the national settlement table: $120 million in *Spencer* and $850 million in *Cox*. After the Monterrey settlement there was only $950 million. The national settlement fund went down $20 million and *Spencer* class counsel received an additional $30 million in attorneys' fees. The funding for the extra attorneys' fees came from the reduction in class proceeds. The failure to disclose this information to the class was in violation of the fiduciary duties owed by class representatives and evidences the inadequate representation.

Moreover, the *Spencer* class counsel "took" (without their client's permission) the $120 million that they had obtained for their respective class members in the settlement with DuPont and gave it to the Respondents to fund the Respondents' settlement in *Cox*. Again, without their clients' knowledge or consent, *Spencer* class counsel withdrew all objections to the *Cox* settlement, thereby subjecting *Spencer* class members to all of the unjustifiable

nuances of the *Cox* settlement, including leak requirements, plumbing exclusions, claims periods, adversarial claims process, and the like. DuPont condoned these surreptitious agreements when it agreed to dovetail the *Spencer* settlement into the *Cox* settlement.

Spencer class counsel suffered from yet another disabling conflict of interest with the class members. Lead class counsel, George Fleming, excluded his 110,000 clients from the definition of the *Spencer* class, then simultaneously settled their claims at the same time as the *Spencer* and *Cox* settlements for per unit sums greatly in excess of that being set aside for class members. In fact, while George Fleming only represented 2% of the potential claimant group of 6 million, and he forced half of those clients back into the *Spencer* and *Cox* settlements, he received a cash settlement equal to 20% of the entire amount Shell and Celanese were paying to settle the nationwide claim in *Cox*.

The *Spencer* settlement suffered from many of the other representative inadequacies that the *Cox* settlement suffered from, including the failure to use subclasses to alleviate the conflict of interest between class members.

V. Denial Of Class Certification Illustrates The Due Process Deficiencies In *Cox* And *Spencer*

Before granting FFC, the trial court denied class certification for a state-wide class, finding that such a proposed class failed to satisfy commonality and typicality. It is theoretically impossible for the trial court to be correct in its denial of class certification and at the same time, be correct in its application of its due process analysis in granting FFC to the *Cox* and *Spencer* class action settlement order.

CONCLUSION

Due process is the vanguard of American jurisprudence. Jurisdiction is essential to due process. Jurisdiction cannot be acquired without compliance with the rules laid down by this Court. A reviewing court must, as a matter of necessity, be permitted to assess jurisdiction *de novo* and not

be limited to acceptance of the conclusory, self-serving recitals of the foreign court that approved the class settlement.

The recent national class action decisions across the country evidence an effort to curb the type of abuses that *Cox* and *Spencer* reflect. The ruling by the SCSCT will only compound the abuses we see today, as it grants carte blanche for future abuse – so long as conflicted class counsel put the right recitals in the final order.

The purpose of class actions is to promote efficiency in the litigation of issues, without compromising the fairness owed to each absent class member by the fundamental concept of jurisdiction. The SCSCT's decision directly contravenes this Court's holding in *Amchem* and Second Circuit and other state jurisprudence on this issue. This case presents this Court with the optimal vehicle for addressing this issue, and thus warrants the granting of a writ of certiorari.

Respectfully submitted,

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April 12, 2004

591 S.E.2d 611

Supreme Court of South Carolina.

HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al., Appellants,

v.

SHELL OIL COMPANY d/b/a Shell Chemical Company, Hoechst Celanese Corporation, and E.I. Dupont de Nemours & Company, Respondents.

No. 25764.

Heard Nov. 18, 2003.
Decided Jan. 12, 2004.

Justice WALLER:

In this direct appeal, the trial court denied appellants' request for class certification and granted summary judgment in favor of respondents. The main issue of this appeal is whether two nationwide class action settlements approved by the Alabama and Tennessee state courts are entitled to full faith and credit, thereby precluding appellants – as absent class members who did not opt out – from proceeding with this action. Moreover, the crucial sub-issue of that question is what is the appropriate **scope of collateral review** this Court should give to the rendering courts' final decisions approving the settlements. The trial court found that: (1) a limited scope of review is proper, and (2) the due process issues were fully and fairly litigated; therefore, the trial court ruled the final settlements are entitled to full faith and credit. We affirm.

FACTS/PROCEDURAL HISTORY

Appellants seek damages against respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E.I. DuPont de Nemours & Co. ("DuPont"), for defective polybutylene plumbing systems. Appellants own structures containing this type of plumbing system. Neither of the respondents manufactured these polybutylene systems, but each produced and sold a resin utilized in the manufacture of the systems.[1] The systems were marketed as an alternative to copper-based systems. Appellants allege respondents **falsely** represented that the polybutylene plumbing systems were of high quality, were reliable, and would last decades. Indeed, appellants claim respondents knew the resins would degrade and corrode when exposed to the chemicals found in ordinary drinking water (e.g., chlorine), and therefore, knew these systems would fail. According to appellants, polybutylene plumbing systems are an "unmitigated disaster" as they experience an unusually high failure rate.

On May 30, 1995, the original plaintiffs filed this lawsuit ("the Howard plaintiffs"). However, two nationwide class action settlements – *Spencer* in Alabama state court and *Cox* in Tennessee state court – were finalized in November 1995; the Howard plaintiffs opted out of these two settlements and subsequently settled their individual

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[1] Shell manufactured and sold polybutylene, which is a raw material plastic, i.e., a resin, to manufacturers who extruded it into the polybutylene pipes used in these systems. Celanese and DuPont manufactured and sold Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.

claims.[2] Appellants successfully intervened in the instant case in 1996 and 1997. The lawsuit was designated as a complex case, and Judge Pieper was assigned to it. Initial discovery in the litigation was restricted to the full faith and credit issue.

Respondents moved for summary judgment arguing that appellants were members of the national class actions which had been settled and those settlements are entitled to full faith and credit. Appellants responded that because class members were not provided with due process, the state courts did not acquire personal jurisdiction, and thus, the final orders should not be accorded full faith and credit. Holding that further inquiry into the facts was appropriate, Judge Pieper denied respondents' motions for summary judgment in June 1998.

Shortly after the denial of summary judgment, Judge Pieper *sua sponte* recused himself after learning that a family member had requested claim information from one of respondents' representatives in the out-of-state litigation. Thereafter, Judge Dennis was assigned to the case.

Respondents moved to have Judge Dennis reconsider or vacate Judge Pieper's order denying summary judgment. The trial court denied this request, finding that Judge Pieper's order was "a temporary ruling which invites another Motion."

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[2] The Howard plaintiffs were three couples who each owned a home with a polybutylene plumbing system. They received settlements for $25,000, $20,000 and $20,000.

Pursuant to Rule 23, SCRCP, appellants requested certification of a class defined, in pertinent part, as follows:

> An opt-in class of all South Carolina persons and entities that own structures in which there has been installed a polybutylene plumbing system, wherever located; and non-resident persons and entities that own such structures located in the State of South Carolina.

Finding that none of Rule 23's requirements had been satisfied, Judge Dennis denied class certification.

Finally, after respondents renewed their motions for summary judgment, the trial court granted judgment in their favor. The trial court found that the Alabama court-approved *Spencer* settlement and the Tennessee court-approved *Cox* settlement were both entitled to full faith and credit. Significantly, the trial court found that the issue of whether absent class members were provided with minimum due process was an issue subject only to extremely limited collateral review, making the dispositive issue whether the due process issue was fully litigated in, and determined by, the Alabama and Tennessee courts. The trial court found that the due process issues relating to the exercise of personal jurisdiction over the absent class members had been fully considered by the *Cox* and *Spencer* courts, and therefore their findings of jurisdiction were entitled to full faith and credit without further review on the merits.

To resolve the issues raised in this appeal, a review of the facts surrounding the nationwide settlements is also necessary.

The Spencer and Cox Settlements

The *Spencer* lawsuit was filed in November 1994 in Alabama state court. At that time, yet another nationwide class action case was pending in a Texas state court, *Beeman v. Shell Oil Co.*, and a settlement was actively being negotiated. Although the parties reached a settlement in *Beeman*, it ultimately fell through when the Texas court denied preliminary approval in February 1995. In May 1995, DuPont reached a settlement in *Spencer*, and the Alabama court preliminarily approved it. However, because the settlement was only with DuPont, claims against Shell and Celanese remained.

According to the original terms of the settlement with DuPont, DuPont agreed to pay 8% of: (1) the actual cash value of physical damage to tangible property caused by a leak in the plumbing system which occurred within 15 years of the installation, and (2) the cost of a replumb completed within 15 years of the installation. The fund for these costs was set at $120 million, and when that amount was paid, DuPont retained the option to provide additional funding. If it opted not to provide additional funding, class members who had not been paid would retain all rights against DuPont.

In June 1995, *Cox* was filed against Shell and Celanese in Tennessee. The same day the lawsuit was filed, the Tennessee court certified the class. Meanwhile, the *Spencer* action was still proceeding against Shell and Celanese, and the Alabama court certified that class as

well. Thus, two competing nationwide classes had been certified.[3]

Negotiations in *Cox* resulted in a settlement being reached with Shell and Celanese on July 31, 1995. The original settlement terms were that Shell and Celanese would provide $850 million to fund replumbs for those claimants who had a qualifying leak. In addition, recovery could be had for physical damage to tangible property resulting from a leak. A centralized facility, the Consumer Plumbing Recovery Center (CPRC), was to be created to administer the terms of the settlement. Like the settlement reached with DuPont in *Spencer,* the agreement tolled the statutes of limitation and repose in the event the fund was exhausted and Shell and Celanese decided not to contribute additional funding. Moreover, future owners were covered by the settlement because the agreement provided for four future notice periods.

Objections were raised to the *Cox* settlement. In October/November 1995, class counsel for both *Cox* and *Spencer* participated in a two-week mediation with California Judge Richard M. Silver,[4] and ultimately, a joint national settlement was reached. This global settlement was basically the *Cox* settlement that previously had been

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[3] It may even be more accurate to say that **three** classes had been certified: a settlement class v. DuPont in Alabama, a trial class v. Shell and Celanese in Alabama, and a settlement class v. Shell and Celanese in Tennessee. The competition aspect, however, clearly was between the trial class against Shell and Celanese in Alabama and the settlement class against those same two companies in Tennessee.

[4] Judge Silver was presiding over another class action suit, this one a statewide class action pending in California.

approved by the Tennessee court, but with several significant changes, such as the joint settlement fund was increased to $950 million; the interest on the funds was to go to the CPRC (not back to Shell and Celanese); and the window for filing claims was increased from one year to two years. In addition, the parties agreed that no objection would be made to *Spencer* class counsel requesting up to $30 million in attorneys' fees. After the global settlement was reached, the objections to *Spencer* by *Cox* class counsel and the objections to *Cox* by *Spencer* class counsel were withdrawn.

On November 17, 1995, the *Cox* court entered a final order approving the class action settlement against Shell and Celanese which included $45 million for class counsel and $3,000 for class representatives. The funds for notice and attorneys' fees were **in addition** to the $950 million in settlement funds. On the same day, the *Spencer* court finally approved the class action settlement against DuPont.

Also on November 17, Shell, Celanese and DuPont entered into an agreement coordinating the two settlements. DuPont agreed to pay 10% of all CPRC costs associated with claims arising from polybutylene plumbing systems with acetal insert fittings, and 10% of CPRC administrative expenses (excluding costs for *Cox* attorneys' fees or notice). These payments by DuPont were to come out of the *Spencer* settlement fund. The coordination apparently allows claimants to file a single claim with the CPRC in order to get relief from both settlements.

ISSUES

Appellants appeal from three orders wherein the trial court granted summary judgment to respondents, denied appellants' request for class certification, and denied respondents' request to vacate or reconsider Judge Pieper's previous order denying summary judgment. However, we find the dispositive issue of this appeal is:

> Did the trial court err in granting summary judgment based on its finding that the *Spencer* and *Cox* final settlement orders are entitled to full faith and credit?

DISCUSSION

Appellants argue that as absent parties who did not appear in the out-of-state actions, they are free to collaterally challenge the *Spencer* and *Cox* judgments based on personal jurisdiction. Appellants claim the Alabama and Tennessee courts did not have personal jurisdiction over them because they were not accorded the minimal due process required for absent class members. Specifically, appellants argue that, for several reasons: (1) notice was constitutionally insufficient; and (2) there was inadequate representation.

Respondents, on the other hand, argue the trial court correctly found that the scope of review when determining full faith and credit is limited to whether the jurisdictional issues were fully and fairly litigated in the rendering courts. Because they claim the issues related to due process were fully and fairly litigated, respondents argue the trial court correctly granted summary judgment without further inquiry into the merits of personal jurisdiction/due process.

Clearly, the **scope of review** aspect of the full faith and credit issue is the threshold question, and, given the current state of the law on this issue, it is also a thorny one.

Scope of Collateral Review

The Full Faith and Credit Clause provides, in pertinent part, that "[f]ull faith and credit shall be given in each state to the . . . judicial proceedings of every other state." U.S. Const. art. IV, § 1. Full faith and credit "generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded **in the State which rendered it**." *Durfee v. Duke,* 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (emphasis added).

The rule in a class action lawsuit is not any different. Indeed, the United States Supreme Court ("USSC") has specifically stated that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit." *Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 374, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996).

Nonetheless, it is also well settled that a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit, and therefore has no res judicata effect as to that party. *E.g., Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also Kremer v. Chemical Const. Corp.,* 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, . . . and other

state and federal courts are not required to accord full faith and credit to such a judgment.") (footnote omitted).

In *Shutts,* the USSC held that the Due Process Clause protects an absent class action plaintiff "even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Shutts,* 472 U.S. at 811, 105 S.Ct. 2965. Thus, in order to provide minimal due process, absent class plaintiffs:

> must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, . . . due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 812, 105 S.Ct. 2965 (citations omitted). If the due process requirements of (1) notice; (2) an opportunity to be heard; (3) an opportunity to "opt out"; and (4) adequate representation are met, the foreign court properly asserts personal jurisdiction over the absent class plaintiffs. Accordingly, those plaintiffs who elect not to opt out are bound by the foreign court's judgment.

The law is less settled, however, when the issue is the scope of review of a rendering court's judgment regarding due process in a class action lawsuit. According to respondents, the Court of Appeals for the Ninth Circuit's view on the law is the correct one. In *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004, 120 S.Ct. 497, 145 L.Ed.2d 384 (1999) ("*Epstein III*"), the Ninth Circuit held that **broad** collateral review of the due process requirements for binding absent class members is **not** available. Instead, the extent of collateral review is **limited** to a consideration of "whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 648-49. The *Epstein III* court declared the following:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court. . . . Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648 (citations omitted).[5]

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[5] While the specific challenge in *Epstein III* involved adequate representation, the *Epstein III* court made clear that its reasoning

(Continued on following page)

Moreover, the procedural history of *Epstein v. MCA, Inc.* is noteworthy. The initial decision by the Ninth Circuit reversed a district court's ruling which gave full faith and credit to a class action settlement in Delaware. *See Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir.1995) ("*Epstein I*"). The *Epstein I* court held that because the Delaware class action settlement released **exclusively federal claims**, the Delaware state court judgment was not entitled to full faith and credit. The USSC reversed and remanded. *See Matsushita Elec. Indus. Co. v. Epstein, supra.* On remand, a divided panel of the Ninth Circuit held that the Delaware judgment was **not** entitled to full faith and credit because it violated due process based on the inadequacy of the class representation. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir.1997) ("*Epstein II*"). Significantly, the *Epstein II* court rejected Matsushita's argument that the court was limited to reviewing "the **procedures** that Delaware had in place to ensure adequate representation, rather than the adequacy of the representation itself." *Id.* at 1242 (emphasis in original). Thereafter, the Ninth Circuit granted rehearing, and a reconstituted panel[6] withdrew its *Epstein II* opinion and rejected the appellants' contention that the Delaware judgment was not entitled to full faith and credit. *Epstein III, supra.*

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applied to all aspects of the *Shutts* due process requirements. *See Epstein III*, 179 F.3d at 649 ("*Matsushita* itself indicates that broad collateral review of the adequacy of representation **(or of the other due process requirements for binding absent class members)** is not available.") (emphasis added).

[6] The authoring judge of both *Epstein I* and *II* had resigned in the interim.

Thus, the final word from the Ninth Circuit in *Epstein III* was the emphatic statement that "where the certifying court makes a determination of the adequacy of representation in accord with *Shutts,*" this determination is **not** subject to broad collateral review. 179 F.3d at 648.[7] The USSC declined to review *Epstein III. Epstein v. Matsushita Elec. Indus. Co.,* 528 U.S. 1004, 120 S.Ct. 497, 145 L.Ed.2d 384 (1999).

After *Epstein III* was decided, however, the Court of Appeals for the Second Circuit handed down *Stephenson v. Dow Chemical Co.,* 273 F.3d 249 (2nd Cir.2001). Appellants contend that, pursuant to *Stephenson,* a broad collateral attack on the nationwide settlements is permissible.[8]

In *Stephenson,* two Vietnam War veterans brought suit in 1998 and 1999 for injuries based on their exposure to Agent Orange during the war. But in 1984, a global class action settlement had been entered on identical claims. The settlement provided that no payments would be made for death or disability occurring after December

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[7] One judge on the panel dissented, standing by the decision in *Epstein II. Epstein III, supra* (Thomas, J., dissenting).

[8] Appellants also argue that South Carolina precedent supports the proposition that the courts of this state may review the jurisdictional underpinnings of a foreign judgment before granting full faith and credit. *See, e.g., Peoples Nat'l Bank of Greenville v. Manos Bros., Inc.,* 226 S.C. 257, 275, 84 S.E.2d 857, 866 (1954) (where in determining the validity of a Georgia divorce decree, the Court stated: "It is well settled that want of jurisdiction over either the person or the subject matter is **open to inquiry** where a judgment rendered in one state is challenged in another.") (emphasis added). We note, however, that nationwide class action lawsuits clearly raise very particularized due process issues, and we therefore focus our analysis on case law in that context.

31, 1994. The *Stephenson* plaintiffs' conditions had not been diagnosed until 1996 and 1998.

The district court dismissed the *Stephenson* lawsuit finding it was an impermissible collateral attack on the 1984 settlement. On appeal, the plaintiffs argued they were inadequately represented, and therefore, the earlier class action settlement did not preclude their claims. The *Stephenson* court agreed thereby allowing a "broad collateral attack" on the class action settlement. The *Stephenson* court specifically found that the plaintiffs' lawsuit could continue because there had been "no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund." *Id.* at 258. The court rejected the defendants' reliance on *Epstein III* for "a limited collateral review theory." *Id.* at n. 6. Instead, the court decided that:

> [T]he propriety of a collateral attack such as this is amply supported by precedent. In *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22; *cf. Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment.").

Id.

As to the merits of the collateral attack, the *Stephenson* court relied on the USSC's recent decisions in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999),[9] to find that the *Stephenson* plaintiffs had not been adequately represented in the 1984 settlement, and therefore were not bound by it.

The USSC granted certiorari to review *Stephenson.*[10] However, the USSC ultimately issued a per curiam decision which vacated the Second Circuit's opinion as to one set of plaintiffs, and, by an equally divided court, summarily affirmed the decision allowing collateral review as to the other set of plaintiffs. *Dow Chemical Co. v. Stephenson,* 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003) (Stevens, J., not participating).

Thus, it remains an open, and hotly litigated, question as to whether limited collateral review is required on the *Shutts* due process requirements in a class action case (*see Epstein III*), or whether a broader, merits-oriented collateral review is permitted (*see Stephenson*). In addition to the conflict in the federal circuits as exemplified by *Epstein III*

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[9] Both these cases involved **direct appeals** of global class settlements in asbestos litigation.

[10] The two questions at issue on certiorari were whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, and, if collateral attack is permissible, whether the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of changes in the law years after the settlement has become final.

and *Stephenson,* there is also disagreement amongst the state courts[11] and legal scholars.[12]

In our opinion, there are important policy considerations favoring both limited and broad collateral review. Certainly, in the specialized context of class action litigation, the significant interests in efficiency and finality favor limited review. If the due process issues are fully and fairly litigated and necessarily decided by the rendering court, then the strong interest in finality militates in favor

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[11] *Compare Fine v. America Online, Inc.*, 139 Ohio App.3d 133, 743 N.E.2d 416, 420 (2000), *cert. denied*, 532 U.S. 942, 121 S.Ct. 1403, 149 L.Ed.2d 346 (2001) (staunchly following *Epstein III* and stating: "Modern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but, rather, by the application of appropriate procedures in the certifying court and by the courts that review its determinations.") *with State v. Homeside Lending, Inc.* 826 A.2d 997, 1016-17 (Vt.2003) (recognizing disagreement on whether collateral attack is available on adequate representation, but indicating its inclination "to follow the recent decision of the Second Circuit Court of Appeals in *Stephenson* because adequacy of representation is 'the quintessence of due process in class actions' ") (citation omitted).

[12] *Compare, e.g.*, Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L.Rev. 765, 771 (1998) (critiquing the *Epstein II* decision, and advocating what became the *Epstein III* position that if the initial forum made a finding of adequate representation and employed "fair procedures" in making the finding, then "the substance of the finding itself is not subject to collateral attack.") (hereinafter "Kahan & Silberman") *with* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L.Rev. 383, 388 (2000) ("The argument for limiting collateral attack contradicts two fundamental principles: first, a court has no jurisdiction over absent class members who have not been adequately represented; second, a judgment entered without jurisdiction may be collaterally attacked if the party bound by the judgment did not appear and had no obligation to do so.").

of an extremely limited collateral review. Without limited review, a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially. It would seem to be a waste of judicial resources to require reviewing courts to conduct an extensive substantive review when one has already been undertaken in a sister state. As the Ohio court stated in *Fine v. America Online:* "To allow substantive collateral attacks would be counter intuitive to [the] procedural relief that a class-action suit is intended to afford our judicial system nationwide." 743 N.E.2d at 421-22.

On the other hand, there is the fundamental interest in not allowing constitutionally infirm judgments to be enforced. It would be troublesome to enforce a class action settlement against parties over whom the rendering court did not have personal jurisdiction. We note, however, that the view espoused in *Epstein III* envisions that direct appellate review of a class action is the appropriate vehicle to correct whatever errors may have been made at the trial court level.[13]

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[13] We also recognize there exists the concern that a particular state may abuse the class action lawsuit by improperly providing a too-friendly forum for class actions. *See* Kahan & Silberman, 73 N.Y.U. L.Rev. at 775-76 (describing the class action forum shopping problem as "sinister" and observing that "both class counsel and defendant may prefer a forum that rubberstamps any settlement they reach"); *see also State v. Homeside Lending, Inc.*, 826 A.2d at 1020 (where the Vermont Supreme Court noted that for "whatever reason, Alabama has been a magnet forum for national class actions, even when Alabama has no connection with the vast majority of the plaintiffs or with the defendants.").

We hold that in a case such as this one, only a limited collateral review is appropriate. It would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court. Moreover, second-guessing the fully litigated decisions of our sister courts would violate the spirit of full faith and credit. *See Fine v. America Online,* 743 N.E.2d at 421.

Therefore, we concur with the Ninth Circuit's view and find due process requires that an absent class member's rights are protected by the adoption and utilization of appropriate procedures by the certifying court; thereafter, the merits of the certifying court's determinations are subject to direct appellate review. As for collateral review, however, due process does not afford any "second-guessing of those determinations." *Epstein III,* 179 F.3d at 648. Instead, what this limited review entails is "an examination of **procedural** due process and nothing more." *Fine v. America Online,* 743 N.E.2d at 421. More specifically, we must determine: (1) whether there were safeguards in place to guarantee sufficient notice and adequate representation; and (2) whether such safeguards were, in fact, applied. *Id.* at 422.

Initially, we note our agreement with the trial court's findings that both the *Spencer* court in Alabama and the *Cox* court in Tennessee actually ruled that the due process requirements had been met. Both these courts specifically found that the respective notice programs met minimal due process. The *Cox* final order stated that the adequacy requirement (in terms of Tennessee's Rule 23) had been met and it had jurisdiction over the parties. The *Spencer* final order found the "settlement fair, adequate and reasonable" to the members of the class.

Accordingly, under a limited collateral review, the two foreign judgments on their face appear to be entitled to full faith and credit. *See, e.g., Epstein III, supra; Fine v. America Online, supra.* Nonetheless, we turn separately to a review of the procedures utilized by the foreign courts to ensure proper notice and adequate representation.

Notice

Some factual background on the notice programs is required.

As noted by the *Cox* court, the notice in *Cox* was "a singularly comprehensive and creative notice program." According to the president of one of the consulting companies hired to provide notice in *Cox,* the program was designed to reach the largest possible number of consumers whose homes contained polybutylene plumbing. Over 5.6 million individual mailed notices were sent; of those, 244,756 were mailed to South Carolina addresses. In addition, there was a toll-free 800 telephone number set up to field questions about the settlement. More than 1 million calls were received, and over 10,000 additional notices were mailed out.

Furthermore, there was an extensive multimedia campaign. For example, between August 21, 1995 and September 3, 1995, a 30-second television spot was aired 213 times on national network and cable television; during September 1995, full page notices appeared in Parade magazine, USA Weekend, USA Today, People magazine, and TV Guide, as well as in 201 daily and weekly newspapers in 13 targeted states (of which South Carolina was one), 38 Hispanic newspapers, and 2 African-American newspapers; on October 3, 1995, a national news conference

was held in Washington, DC, and a press release was sent to 2,000 newspapers, wire services, magazines and broadcast points across the United States; and a World Wide Web home page was created. Statistics as of October 30, 1995, estimated that the media campaign reached over 90% of those Americans over age 25, or exposure to over 150 million people.

Likewise, in *Spencer,* an extensive notice program occurred during August, September and October 1995. Because the DuPont product was sold "more heavily in the Mid-Atlantic and Southeast regions in site-built ('starter') homes, mobile homes, and apartments," the notice program was designed to reach people that fell within this demographic, which was determined to be middle-class, high school educated adults with household incomes of less than $45,000. Over 2.5 million notices were directly mailed to people in 12 states, of which South Carolina was one. The mailing list was generated based on mobile home ownership listings. Over 275,000 phone calls were initially received on the 800 number, and 90,000 additional notices were sent out based on individual requests.

As in *Cox,* there was a multimedia campaign in *Spencer* as well. The notice was published in USA Today, USA Weekend, TV Guide, Jet magazine, Parade magazine, and 66 Spanish-language newspapers. Television and radio commercials were aired; press and video news releases were distributed. The notice program cost $7.4 million.

Regarding the content of the notices, the notices in both *Cox* and *Spencer* explained the terms of the settlement, provided for the opportunity to participate (e.g., by

filing objections and appearing at the fairness hearing), and gave information on how to opt out.

Nonetheless, appellants contend that notice to them as absent class members was constitutionally insufficient. Appellants argue, *inter alia,* that they were entitled to personal notice, rather than by publication. In addition, they maintain that the notice programs were deficient to all class members **other than** mobile home owners and the content of the notice was incomplete.

Without question, due process requires that absent class plaintiffs be given notice. *Shutts, supra.* However, the standard for notice is that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts,* 472 U.S. at 812, 105 S.Ct. 2965 (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

In the final order approving the class settlement, the *Cox* court made several general findings, and numerous specific findings, related to notice. The *Cox* court characterized the notice program as excellent and found it was the best notice practicable under the circumstances. The court further described the program as one unprecedented in "reach, scope, and effectiveness." Additionally, the *Cox* court used court-appointed class notice providers (two consulting companies), and considered testimony of employees of these companies. The final order extensively details the notice program, highlighting many of the aspects outlined above. The *Cox* court concluded that the notice program "met and exceeded" both minimum due

process requirements and the notice requirements under Tennessee's class action rule.[14]

Clearly, the *Cox* court designed and utilized various procedural safeguards to guarantee sufficient notice under the circumstances. Pursuant to a limited scope of review, we need go no further in deciding the *Cox* court's findings that notice met due process are entitled to deference.

As in *Cox,* the issue of notice was fully litigated in *Spencer.* The *Spencer* court issued an order prior to the implementation of the notice program specifically approving the notice and authorizing the notice program. [15] In the final order approving the class settlement, the *Spencer* court stated that notice was sent "via first class and by means of a massive national media campaign." The court specifically found that the form of notice satisfied both due process requirements and the notice requirements under Alabama's class action rule. The *Spencer* court relied on the affidavit of the consultant who designed the notice program and related the details of the notice program, as discussed above. The court concluded that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the Action and their rights therein."

Accordingly, we hold that under a limited collateral review it is clear there were proper procedures in place to

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[14] We note further that the *Cox* court had been kept apprised of the notice program as it progressed.

[15] This order expressly stated that the court had heard arguments of counsel on the notice issue.

ensure notice in the *Spencer* case complied with minimum due process.

Adequate Representation

Appellants argue full faith and credit should not be accorded to the *Spencer* and *Cox* settlements because adequate representation was lacking. More specifically, appellants argue that conflicts within the class required subclasses; class counsel had impermissible conflicts with class members; and class representatives, as mobile home owners, were inadequate representatives for other types of owners, such as those who own multi-unit structures. Pursuant to a limited review, however, we need merely to determine whether there were safeguards in place to guarantee adequate representation. We conclude that in both *Spencer* and *Cox,* there were the proper procedures present.

Shutts declared that due process "of course requires that the named plaintiff **at all times adequately represent** the interests of the absent class members." 472 U.S. at 812, 105 S.Ct. 2965 (emphasis added).

Recently, the USSC has elaborated on what constitutes adequate representation. In *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), an asbestos litigation case decided **after** the *Spencer* and *Cox* settlements were finalized, the USSC affirmed the Third Circuit's decision to vacate a global class settlement where the federal district court had certified the class for settlement purposes. The *Amchem* class covered plaintiffs who had been exposed to asbestos; the plaintiffs included people who had already manifested personal injury **and** those who had not yet manifested any

affliction; this latter group was labeled the "exposure-only" plaintiffs.

Initially, the *Amchem* court made clear that while settlement is certainly relevant to a trial court's decision to certify a class, the other requirements for certification under Rule 23, Fed.R.Civ.P., must still be given appropriate, and even heightened, attention because they are specifically designed to bind and protect absent class members. *Id.* at 619-21, 117 S.Ct. 2231. The court also clearly stated that the overall fairness of a settlement is no substitute for Rule 23's certification criteria. *Id.* at 622, 117 S.Ct. 2231.[16]

With respect to adequate representation, the *Amchem* court stated that the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625, 117 S.Ct. 2231. Significantly, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 625-26, 117 S.Ct. 2231 (internal quotations and citations omitted). Furthermore, "[t]he adequacy heading also factors in competency and conflicts of class counsel." *Id.* at 626 n. 20, 117 S.Ct. 2231.

On the merits of the adequate representation issue, *Amchem* found serious problems with the global class settlement. First, the named parties had "diverse medical

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[16] *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 863-64, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) ("the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b)"). The USSC's decision in *Ortiz*, decided two years after *Amchem*, reiterated many of the significant holdings of *Amchem*.

conditions" but nevertheless "sought to act on behalf of a single giant class rather than on behalf of discrete subclasses." *Id.* at 626, 117 S.Ct. 2231. In addition, the USSC found it significant that the currently injured plaintiffs' interest in "generous immediate payments" would be adverse to the exposure – only plaintiffs' interest "in ensuring an ample, inflation – protected fund for the future." *Id.* The *Amchem* court also was troubled by certain terms of the settlement, *to wit,* it included no adjustment for inflation and only a few claimants per year could opt out at the back end. Thus, the court stated the global settlement had "no **structural assurance** of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 627, 117 S.Ct. 2231 (emphasis added).

Appellants argue that, pursuant to *Amchem,* there was inadequate representation, and therefore *Spencer* and *Cox* should not be given full faith and credit. Respondents argue that *Amchem* is not appropriately considered on this issue because it involved a direct appeal, rather than a collateral review as in this case. Along the same lines, respondents also contend that *Amchem* cannot be retroactively applied to *Spencer* and *Cox,* both of which were finalized in 1995, when *Amchem* was decided in 1997.

Given our limited scope of review, we need not address the merits of appellants' arguments on adequate representation. In addition, we believe the arguments raised by respondents on *Amchem's* applicability do not require resolution for our limited review. Instead, we find it is patent that both the *Spencer* and *Cox* courts had procedures in place to ensure adequate representation. For example, the *Spencer* court made preliminary findings regarding the adequacy of the named plaintiff representatives and the

qualifications of counsel. Moreover, many of appellants' allegations regarding the actions of class counsel were expressly raised at the *Spencer* fairness hearing. Finally, the final order in *Spencer* stated that the settlement was fair, adequate and reasonable to the members of the class. The *Cox* court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class. The court further noted that the $45 million in attorneys' fees represented only approximately 5% of the settlement fund and were not deducted from the settlement fund. The court in *Cox* specifically stated that "the Agreement is the result of good faith, arms-length, and non-collusive negotiations." Finally, we note the *Cox* court also found that the settlement class met the adequacy requirements of Tennessee's class action rule.

We find there obviously were procedures in place to ensure adequate representation in both *Spencer* and *Cox*, and that such procedures were implemented throughout. Accordingly, these court findings survive our limited collateral review. Furthermore, it is important to observe that we agree with the *Fine v. America Online* court's view that "[m]ere disagreement with the terms of a settlement cannot provide grounds for a collateral attack" on a class settlement. 743 N.E.2d at 423.

CONCLUSION

In sum, we find that the proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one

limited to a consideration of whether the **procedures** in the prior litigation allowed a full and fair opportunity to litigate the due process issues. It is our opinion that such procedures were not only in place in *Spencer* and *Cox,* but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the *Spencer* and *Cox* orders approving the nationwide settlements and properly granted summary judgment to respondents.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) HOSPITALITY MANAGEMENT) ASSOCIATES, INC.; ASHLEY) INNS, A PARTNERSHIP, D/B/A) HAMPTON INN RIVERVIEW;) BEST WESTERN NAVAL) CENTER, INC., D/B/A) HOLIDAY INN (BEAUFORT);) WILLIAM TAYLOR; CANAL) COURT, II, L.P., AS GENERAL) PARTNER FOR BENTLEY) COURT, II, L.P.; BOYD &) COMPANY; VICTOR APAT,) INDIVIDUALLY AND ON) BEHALF OF R & A PARTNERS;) RICHARD ACKERMAN;) THOMAS BECKMAN; AND) EUGENE CONE,)) Plaintiffs,)) -versus-)) SHELL OIL COMPANY D/B/A) SHELL CHEMICAL) COMPANY, HOECHST) CELANESE CORPORATION,) and E.I. du PONT de NEMOURS) AND COMPANY,)) Defendants.)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **ORDER GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Court on the Defendants' renewed Motions for Summary Judgement. The grounds of the motions are that earlier court approved class action settlements are entitled to full faith and credit from this Court, which precludes the Plaintiffs' claims. Upon consideration of

the memoranda and exhibits submitted by the parties, the pleadings, and the reasons set forth herein, the motions are granted.

I.

The Plaintiffs alleged that polybutylene plumbing systems in their residences or commercial properties were defective. Polybutylene plumbing systems are comprised of, among other things, polybutylene pipe and various types of "fittings" – made of different raw materials and different designs – that are used to join the polybutylene pipe. The Defendants are not manufacturers of the component parts of the plumbing, but rather are suppliers of the plastic materials used in some of the different types of polybutylene plumbing.

Prior to 1995, litigation over polybutylene plumbing systems had been pending in many courts around the country for more than a decade. The first purported nationwide polybutylene plumbing class action, ***Beeman v. Shell Oil Co.*** (***"Beeman"***), was filed in Texas state court in September 1993. That followed with other lawsuits filed throughout the country purporting to be statewide or nationwide class actions.[1] With the assistance of a

[1] The ***Beeman*** plaintiffs subsequently dismissed their state court action and refiled their case in the United States District Court for the Southern District of Texas. ***Beeman v. Shell Oil Co.***, No. G-95-214 (S.D. Tex., filed April 18, 1995). Additionally, from late February to early June 1995, class actions were filed in Maryland, Missouri, Illinois, Louisiana, Alabama, California, and New Jersey. In July 1995, the plaintiffs filed a proposed notice program with the Court. On August 16, 1995, the Court entered an Order approving the notice program after considering the pleadings and argument and establishing opt-out or

(Continued on following page)

nationally-known mediator, the ***Beeman*** plaintiffs and the Defendants reached a tentative settlement in October, 1994, but in February, 1995, the Texas court denied preliminary approval of the settlement without hearing any evidence on the fairness of the settlement and without any explanation. Shortly thereafter, other lawsuits were filed against the Defendants throughout the country purporting to be statewide or nationwide class actions.

In November, 1994, a nationwide class action of plaintiffs' filed against Shell, Hoechst Celanese, and DuPont in Greene County, Alabama, a nationwide class action styled ***Spencer v. Shell Oil Co.*** (***"Spencer"***). In May, 1995, DuPont reached a settlement agreement with the ***Spencer*** class plaintiffs, which the Alabama court preliminarily approved after a hearing on May 25, 1995.

In June, 1995, another group of plaintiffs filed ***Cox, et al. v. Shell Oil Co., et al.*** (***"Cox"***) against Celanese and Shell, a national class action in Obion County, Tennessee. After the ***Cox*** court certified a nationwide class, ***Cox*** class counsel joined with the plaintiffs' attorneys in ***Beeman*** to prosecute the ***Cox*** action on behalf of owners of all mobile homes and site-built structures with polybutylene plumbing.

On July 31, 1995, the ***Cox*** and ***Beeman*** plaintiffs, representing the certified national class, provisionally settled with Shell and Celanese. The ***Cox*** court preliminarily approved the proposed settlement and approved the class action settlement notice program. On August 9, 1995,

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objection dates. Each potential class member was given the opportunity to be excluded from the class and/or object to the settlement.

the ***Cox*** court heard arguments from various objectors, including ***Spencer*** class counsel, on, among other things, the adequacy of the proposed notice to the class, the applicable due process requirements, and the adequacy of representation of the class. On August 24, 1995, the ***Cox*** court issued an order preliminarily approving the forms of notice. On August 30, 1995, the ***Cox*** court heard argument and evidence in favor of, and objections to, the notice program, and on September 22, 1995, the court gave final approval to the forms of notice, scheduled a fairness hearing, and set opt-out and objection dates.

The final ***Cox*** settlement was the result of intense negotiations among the ***Cox*** class counsel, ***Spencer*** class counsel, lawyers for other putative classes of plaintiffs, and the Defendants. With the endorsement of the ***Cox*** and ***Spencer*** courts, negotiations took place under the direction of Judge Richard Silver of the Monterey Superior Court, California, who was presiding over still another putative class action brought against the Defendants. Those final negotiations culminated in a $100 million enhancement to the ***Cox*** settlement amount, an expanded period of time during which class members could obtain relief, and an agreement that interest on settlement funds would be deposited for the benefit of the class and not credited against the settlement cap.[2]

In late 1995, following multi-million dollar notice campaigns regarding the proposed settlement, the Tennessee

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[2] The ***Spencer*** plaintiffs, having already settled with DuPont, also settled with Shell and Celanese. Ultimately, DuPont, Shell and Celanese entered into an agreement which enabled the ***Cox*** and ***Spencer*** settlements to be coordinated.

and Alabama courts conducted evidentiary hearings, which were open to all interested parties, on the fairness of the proposed settlements. At their conclusion, the ***Cox*** and ***Spencer*** courts found that the settlements were fair, reasonable, and adequate. On November 17, 1995, both the ***Cox*** and ***Spencer*** courts gave final approval to the settlements, finding that the settlements were fair, adequate and reasonable in all respects.[3]

The Tennessee court issued a final judgment dismissing the national class's claims against Shell and Celanese and barring all members of the nationwide Settlement Class from prosecuting polybutylene plumbing claims against Shell and Celanese in all other forums:

> It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice. . . .
>
> It is further ORDERED that . . . Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of

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[3] Under the ***Cox*** settlement, Celanese and Shell agreed to, among other things, contribute initially up to $950 Million to provide relief to homeowners nationwide, including resident [sic] of South Carolina, with leaking polybutylene plumbing. At the time this Motion was briefed in early 2001, over $830 Million had been spent under the settlement including over $30 Million in South Carolina.

> the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action. . . .

Each individual or entity subject to the ***Cox*** judgment was afforded an opportunity to exclude himself from the class by submitting a written exclusion or "opt out" request before October 20, 1995.

The ***Spencer*** court also issued a final judgment, approved a national class action settlement dismissing the plaintiff's complaints and barring all members of the settlement class from bringing the same claims in other forums, and relieving the Defendants of liability. The ***Spencer*** "opt out" expired on October 27, 1995.

None of the Plaintiffs in this South Carolina action opted out of the ***Cox*** or ***Spencer*** settlements. Therefore, the express terms of the ***Cox*** and ***Spencer*** final judgments bar the Plaintiffs in this action from pursuing these claims against Shell, Celanese, and DuPont, in this or any other court.

II.

The issue here is whether the judgments of the Tennessee court approving the ***Cox*** settlement and the Alabama court approving the ***Spencer*** settlement, which have already been extended full faith and credit by the courts of Alabama, Arizona, Florida and Wisconsin, are also entitled to full faith and credit in this Court. Under controlling Under [sic] States Supreme Court authorities, the ***Cox*** and ***Spencer*** judgments are presumptively entitled to full faith and credit. The grounds on which the Plaintiffs may avoid these judgments are very narrow and subject to only limited collateral review.

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Congress codified the constitutional guarantee of full faith and credit more than two hundred years ago and it remains essentially unchanged today:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. The United States Supreme Court has held consistently that this constitutional mandate means "the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." ***Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n***, 455 U.S. 691, 704 (1982); *see also* ***Kremer v. Chemical Constr. Corp.***, 456 U.S. 461, 466 (1982). Thus, under the full faith and credit doctrine, the validity and effect of a foreign judgment is determined by the laws of the state that rendered it.

Full faith and credit principles also extend to questions of jurisdiction. ***Underwriters Nat'l Assurance Co.,*** 455 U.S. at 706. It is axiomatic that a judgment must be supported by proper jurisdiction over the subject matter and over the relevant parties. ***Id.*** at 704-05 n.10. Thus, "one State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction

merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State." ***Id.*** In ***Underwriters***, the Supreme Court prescribed the permissible scope of review in determining whether to grant full faith and credit to another court's judgment, particularly when the rendering court's jurisdiction and authority to enter the judgment are questioned:

> A judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. The [second court], therefore, should have determined in the first instance whether the [original court] fully and fairly considered the question of . . . jurisdiction. . . . If the matter was fully considered and finally determined in the [original] proceedings, the judgment was entitled to full faith and credit in the [second court].

Id. at 706-07 (citing ***Durfee***, 375 U.S. at 111) and at 709 n.16 ("[T]he fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue.").

Decisions by the South Carolina courts are in accord with the above principles. ***See, e.g.***, ***Hamilton v. Patterson***, 236 S.C. 487, 492, 115 S.E.2d 68, 70 (S.C. 1960); ***Taylor v. Taylor***, 229 S.C. 92, 98, 91 S.E.2d 876, 879 (S.C. 1956); ***Gregoire v. Byrd***, 338 S.C. 489, 493-96, 527 S.E.2d 361, 363-65 (S.C. Ct. App. 1999) (reciting constitutional principles of full faith and credit and noting that a foreign judgment is entitled to full faith and credit even as to

questions of jurisdiction); ***Colonial Pac. Leasing Corp. v. Taylor***, 326 S.C. 529, 532-34, 484 S.E.2d 595, 596-97 (S.C. Ct. App. 1997); ***Carson v. Vance***, 326 S.C. 543, 551, 485 S.E.2d 126, 130 (S.C. Ct. App. 1997); ***Nationsbank of North Carolina v. Parsons***, 324 S.C. 506, 512, 477 S.E.2d 735, 738 (S.C. Ct. App. 1996) ("the crux of the Full Faith and Credit Clause of the United States Constitution is that courts of one state must give such force and effect to a judgment of a sister state as that judgment would have in the sister state."); ***Bankers Trust Co. v. Braten***, 317 S.C. 547, 551, 455 S.E.2d 199, 200 (S.C. Ct. App. 1995) ("[A] foreign judgment which is regular on its face generally may not be collaterally attacked."); ***Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping and Gardening Ctr., Inc.***, 315 S.C. 88, 431 S.E.2d 632, 634 (S.C. Ct. App. 1993).

Significantly, the full faith and credit analysis does not change merely because the case involves a class action or a judgment incorporating a class action settlement. In ***Matsushita Elec. Indus. Co. v. Epstein***, 516 U.S. 367 (1996), the Supreme Court held, "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the [Full Faith and Credit] Act." ***Id.*** at 374.

Full faith and credit is a Constitutional guarantee for all judgments, including class action judgments, in which the rendering court had jurisdiction. In the context of a class action, the Supreme Court in ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797 (1985), held that a state court properly exercises jurisdiction over non-resident, absent class members by providing them with minimum due process in its own proceeding. In ***Matsushita***, the Supreme

Court confirmed that the issue of whether a state court provided absent class members with the due process required by ***Shutts*** to bind them to its judgment is subject to extremely limited collateral review provided the findings of the rendering court reflect that the court affording an opportunity to litigate the due process issue. The voluminous record on this motion demonstrate [sic] that the ***Cox*** and ***Spencer*** judgment both meet this requirement.

The authority of a state court to exercise jurisdiction over absent class members has been conclusively upheld by the United States Supreme Court. In ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797 (1985), the Court stressed that state courts "may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum" if minimum due process requirements are met. 472 U.S. at 811-12. ***Shutts*** established that minimum due process consisted of: (1) reasonable notice, (2) an opportunity to be heard and participate, (3) the right to opt out, and (4) adequate representation. ***Id.***

Matsushita alone would require this Court to limit its review of the ***Cox*** and ***Spencer*** judgments to the due process findings of the respective courts. However, the leading federal case interpreting ***Matsushita*** also confirms that class action judgments are subject only to limited collateral review.

In ***Matsushita***, the Supreme Court reversed a decision by the Ninth Circuit Court of Appeals that denied full faith and credit to a Delaware state court class action judgment. The ***Matsushita*** Court held that the Delaware judgment was entitled to full faith and credit under the United States Constitution notwithstanding the fact that

the judgment released claims within the exclusive jurisdiction of the federal courts. In explaining its reasoning, the Court satisfied itself that the due process requirements of ***Shutts*** had been met by *referencing* the Delaware court's findings on these matters (notice, the opportunity to be heard, and the adequacy of the representation):

> [T]he Court of Chancery found, and the Delaware Supreme Court affirmed, that the settlement was "fair, reasonable, and adequate and in the best interests of the . . . Settlement Class" and that notice to the class was "in full compliance with . . . the requirements of due process." . . . The Court of Chancery "further determined that the plaintiffs,. . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class"

Matsushita, 516 U.S. at 378-89. Indeed, for full faith and credit purposes, the Court confined its review of the prior Delaware judgment solely to the Delaware court's findings on the ***Shutts*** elements of due process necessary to bind absent class members. Having confirmed that the Delaware court considered and addressed the relevant due process elements, the Court looked no further on the issue.

The holdings of the Court in ***Matsushita*** are well explained in ***Epstein v. MCA, Inc.***, 179 F.3d 641, 655 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999), in which the Ninth Circuit confirmed the settled rule under the Full Faith and Credit Clause prohibiting "collateral second guessing

of [the rendering court's] determinations." ***Id.*** In ***Epstein***,[4] the plaintiffs claimed that a prior Delaware class action judgment should not be accorded full faith and credit because it violated their due process rights to adequate representation. 179 F.3d at 644. They argued that ***Shutts*** created a "largely unfettered right to challenge collaterally the adequacy of representation in class actions." ***Epstein***, 179 F.3d at 647.

The Plaintiffs argue that unlike the ***Epstein*** plaintiffs, they allegedly did not receive actual notice of the prior proceeding and thus did not have an opportunity to participate or appear in the original proceeding. The Plaintiffs miss the issue. In ***Epstein v. MCA, Inc.***, 179 F.3d 641 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999), the Ninth Circuit – relying on the Supreme Court's ***Matsushita*** and ***Shutts*** decisions – flatly rejected any notion of broad collateral review of class judgments and held that class members' due process rights are primarily protected by the rendering court and not by collateral review. Whether or not they received actual notice of the ***Cox*** and

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[4] The procedural history of the ***Epstein*** case is important. The Ninth Circuit's original decision in ***Epstein v. MCA, Inc.***, 50 F.3d 644 (9th Cir. 1995), reversed a federal district court ruling and held, among other things, that a Delaware state court judgment was not entitled to full faith and credit. In ***Matsushita***, the Supreme Court reversed the Ninth Circuit's decision and remanded for proceedings consistent with its opinion. On remand, the Ninth Circuit initially held again in ***Epstein v. MCA, Inc.***, 126 F.3d 1235 (9th Cir. 1997), that the Delaware state judgment was not entitled to full faith and credit. On rehearing, however, the Ninth Circuit withdrew its 1997 opinion and issued its final ***Epstein*** decision granting full faith and credit to the Delaware judgment based upon the ***Matsushita*** opinion. (*See* procedural history detailed at 179 F.3d at 642-643).

Spencer proceedings is not determinative of whether a class action judgment is entitled to full faith and credit. The issue is whether the rendering court provided absent class members with the due process required by ***Shutts*** to bind them to its judgment. ***Shutts*** does not require that class notice be actually received, nor do subsequent cases interpret it to impose such a requirement. Due process in the class action context simply does not contemplate or require that each potential class member receive actual notice of the proceeding.

The Plaintiffs claim that the ***Cox*** and ***Spencer*** judgments merely recite that the court had jurisdiction and that ***Williams v. North Carolina***, 325 U.S. 226 (1945) supports their contention that this Court is not bound by such "unsupported recitals in a foreign court's decree." Relying on ***Williams***, the Plaintiffs assert that this Court must make its own determination of whether the Tennessee court had jurisdiction.

In ***Williams***, a judgment of the Supreme Court of North Carolina affirming a conviction for bigamous cohabitation under a North Carolina law, was assailed on the ground that the North Carolina court had improperly denied full faith and credit to a prior divorce decree entered by a trial court in Nevada. ***Williams***, 325 U.S. at 227.[5]

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[5] At the outset, the Supreme Court emphasized that a state's power to grant a divorce, *i.e.*, jurisdiction itself, turned on determining an individual's domicile. ***Id***. at 229. The case is replete with state public policy considerations attendant to the issue of domicile since it affects "personal rights of the deepest significance" and "touches the basic interests of society" such as marriage, divorce, and probate.

Most significantly, the ***Williams*** court found that the domicile issue, *i.e.*, jurisdiction, was not litigated or decided in Nevada. ***Id.*** at 230. In fact, the Court emphasized that if the Nevada court had determined that issue, then it would not be subject to relitigation in North Carolina. ***Id.*** n.6 ("We have not here a situation where a State disregards the adjudication of another State on the issue of domicile squarely litigated in a truly adversary proceeding."). Furthermore, the Court stressed that North Carolina, which was "concerned with the vindication of its own social policy," would not be bound by an "unfounded" recital in the Nevada divorce decree. ***Id.*** at 230. In making its decision, the Court found that under the uncontroverted facts of the case, North Carolina fairly assessed that there was no foundation for the Nevada divorce decree because the individual in question had made no effort or even pretense about changing his domicile to Nevada such that it had jurisdiction to grant the divorce. ***Id.*** at 235-36. As such, the Supreme Court ruled that North Carolina had not erred when it refused to grant full faith and credit to the Nevada divorce decree. Thus, contrary to Plaintiffs' contention, ***Williams*** does not stand for the proposition that this Court or any other court is free to engage in *de novo* review of jurisdictional issues that were litigated and decided by the rendering court.[6]

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[6] The Plaintiffs also assert that ***Peoples Nat'l Bank of Greenville v. Manos Bros., Inc.***, 226 S.C. 257, 84 S.E.2d 857 (1954) supports their claim that this Court may collaterally review the ***Cox*** court's "mere recital" of jurisdiction. However, ***Peoples*** simply represents an application by the South Carolina Supreme Court of the distinction drawn by the United States Supreme Court in ***Williams*** between adjudication of jurisdiction and a mere recital of it.

III.

The Supreme Court does not allow a state court to examine *de novo* or undertake such broad collateral review of another state court's judgment before according it full faith and credit. Rather, the permissible scope of review here is to examine the findings of the ***Cox*** and ***Spencer*** courts, subject to the limited collateral review allowed by the Supreme Court, and ascertain whether the Tennessee and Alabama courts extended the relevant due process to the nationwide class. The record unmistakably shows that the courts fully considered all due process issues relating to its jurisdiction over absent class members and determined that jurisdiction existed. Thus, the judgments are entitled to full faith and credit in this Court as guaranteed by the Constitution.

In the leading case of ***Epstein v. MCA, Inc.***, 179 F.3d 641 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999),[7] the plaintiffs there claimed that a prior Delaware class action judgment should not be accorded full faith and credit

[7] The procedural history of the ***Epstein*** case is important. The Ninth Circuit's original decision, ***Epstein v. MCA, Inc.***, 50 F.3d 644 (9th Cir. 1995) (***"Epstein I"***), reversed a federal district court ruling and held, among other things, that a Delaware state court judgment was not entitled to full faith and credit. In ***Matsushita***, the Supreme Court reversed the Ninth Circuit's decision in ***Epstein I*** and remanded for proceedings consistent with its opinion. On remand, the Ninth Circuit initially held again in ***Epstein v. MCA, Inc.***, 126 F.3d 1235 (9th Cir. 1997) that the Delaware state judgment was not entitled to full faith and credit. On rehearing, however, the Ninth Circuit withdrew its 1997 opinion and issued its final ***Epstein II*** decision granting full faith and credit to the Delaware judgment based on the Supreme Court's ***Matsushita*** opinion. (*See* procedural history detailed in ***Epstein II***, 179 F.3d at 642-43).

because it violated their due process rights to adequate representation. 179 F.3d at 644. They argued that ***Shutts*** created a "largely unfettered right to challenge collaterally the adequacy of representation in class actions." ***Epstein II***, 179 F.3d at 647. The Ninth Circuit strongly disagreed:

> ***Shutts*** does not support the broad collateral review that the Epstein appellants seek. In ***Shutts***, the Court identified various procedural safeguards that are necessary to bind absent class members, including notice, the opportunity to be heard, the opportunity to opt out, and adequate representation. 472 U.S. at 812, 105 S.Ct. 2965. However, nowhere in ***Shutts*** did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with ***Shutts***, this determination is subject to collateral review. ***Shutts*** in fact implies that such review is unwarranted by emphasizing that the certifying court is charged with protecting the interests of the absent class members. *See id.* at 809, 105 S.Ct. at 2965. Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court.

Id. at 648. As such, the court held that "due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review." ***Id.*** Thus, the "extent of collateral review is limited" to consideration of "whether the procedures in

the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." ***Id.*** at 648-49 (citing ***Kremer***, 456 U.S. at 481).[8] The Ninth Circuit confirmed that the limited collateral review "would not . . . include reconsideration of the merits of the claim or issue" and noted that " 'state proceedings need do no more than satisfy *minimum* procedural [due process] requirements . . . in order to qualify for the full faith and credit guaranteed by federal law.' " ***Id.*** at 649 (emphasis added).

The Supreme Court does not allow a state court to undertake broad collateral review of another state court's judgment before affording it full faith and credit. Rather, the permissible scope of review here is to examine the findings of the ***Cox*** and ***Spencer*** courts and ascertain whether the relevant due process issues – reasonable notice, an opportunity to be heard and participate, the right to opt out, and adequate representation – were fully and fairly addressed. *See* ***Underwriter's Nat'l Assurance***, 455 U.S. at 707; ***Shutts***, 472 U.S. 811-12.

Because full faith and credit gives the judgment of a state court "the same credit, validity, and effect in every other court of the United States" as it has in the state where it is pronounced, ***Underwriters Nat'l. Assurance Co.***, 455 U.S. at 704, this Court must accord the earlier judgments the same validity and effect that it would have in their own courts. Just as the ***Fine*** court first looked to

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[8] In ***Kremer*** the Supreme Court clarified that, in the context of full faith and credit, a "full and fair opportunity" to litigate entails nothing more than the procedural requirements of due process. ***Kremer***, 456 U.S. at 482 n.24.

Illinois preclusion law, this Court looks to Tennessee and Alabama law to determine whether the Plaintiff would be precluded from raising their claims in those courts.

Tennessee preclusion law is well-settled. The doctrine of res judicata bars a second suit between the same parties on the same cause of action with respect to all issues which were or could have been brought in the former suit. ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987); ***White v. White***, 876 S.W.2d 837, 55-56 (Tenn. 1994); ***Lien v. Couch***, 993 S.W.2d 53, 55-56 (Tenn. App. 1999).[9] To be successful on a plea of res judicata in Tennessee, a party must show (1) the underlying judgment was rendered by a court of competent jurisdiction, (2) the same parties were involved in both suits, (3) the same cause of action was involved in both suits, and (4) the underlying judgment was on the merits. ***White***, 876 S.W.2d at 839; ***Lien***, 993 S.W.2d at 56.

Here, the ***Cox*** judgment approving the class action settlement is a final order on the merits of the settlement issued by a court of competent jurisdiction over all parties, including absent class members of a certified plaintiff class. The Plaintiff can make no argument that Tennessee courts would regard the ***Cox*** judgment as anything other than a complete bar to the claims they seek to bring in this Court. The ***Cox*** settlement and final judgment terminated the claims against the Defendants in the nationwide class judgement. The law of Alabama is the same. ***Carlton v.***

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[9] The doctrine of collateral estoppel bars the same parties or their privies from relitigating in a second suit issues that were actually litigated and determined in a former suit. ***Massengill***, 738 S.W.2d at 631.

Owens, 443 So. 2nd 1227 (1983); ***Beverly v. Owens***, 494 SO. 2nd GS (1986); ***French v. Steel, Inc.***, 445 SO 2nd 561 (1984); ***Imperial Crown Marketing Corp v. Wright***, 560 SO 2nd 1025 (1989).

IV.

The only remaining step in the full faith and credit analysis is for this Court to evaluate, subject to the limited collateral review allowed by the Supreme Court, whether the Tennessee and Alabama courts extended the requisite due process to the nationwide ***Cox*** and ***Spencer*** class. As set forth below, this Court finds that the ***Cox*** and ***Spencer*** judgments were fully litigated and decided – after several adversarial proceedings and on a voluminous record – by the respective Tennessee and Alabama Courts.

(A)

The issue of subject matter jurisdiction was fully contested, briefed, and argued before being finally decided by the ***Cox*** and ***Spencer*** courts. For example, on August 22, 1995, the ***Cox*** court issued a reasoned and thorough order rejecting a subject matter jurisdiction challenge: "[v]arious intervenors have filed motions attacking the subject matter jurisdiction of this Court. The Court has considered the motions, oral arguments and briefs submitted by the parties, and finds the motions are without merit." Therefore, the issue of subject matter jurisdiction was fully litigated and finally decided by the rendering courts.

Similarly, the issue of personal jurisdiction was addressed and determined by the ***Cox*** and ***Spencer*** courts. In its final order, the ***Cox*** court ruled that "the

Court has jurisdiction over all claims asserted in the Action on behalf of . . . all members of the Settlement Class." Therefore, the issue of personal jurisdiction was fully litigated and finally decided by the rendering courts.

As noted above, the United States Supreme Court in ***Shutts*** established the minimum due process required to confer personal jurisdiction over absent class members and bind them to a resulting judgment: (1) reasonable notice, (2) an opportunity to be heard and participate, (3) the right to opt out, and (4) adequate representation of absent class members. ***Shutts***, 472 U.S. at 811-12.

The record demonstrates that the respective courts fully considered all due process issues relating to its exercise of jurisdiction over absent class members and determined that jurisdiction existed. Thus, the ***Cox*** and ***Spencer*** judgments are entitled to full faith and credit in this Court as guaranteed by the Constitution.

The Supreme Court in ***Shutts*** delineated the "reasonable notice" to class members necessary to comport with due process. "The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " ***Shutts***, 472 U.S. at 812 (citing ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 314-315 (1950) and ***Eisen v. Carlisle & Jacquelin***, 417 U.S. 156, 174-75 (1974)); *see also* Fed. R. Civ. P. 23(c)(2) (in class actions, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). Moreover, "the notice

should describe the action and the plaintiffs' rights in it." ***Shutts***, 472 U.S. at 812.

Following extensive hearings on the matter, the ***Cox*** and ***Spencer*** courts considered the adequacy of the notice of the settlement, they separately and ultimately concluded that the notice campaign exceeded the minimum standards of due process. Class counsel, in both cases, enlisted the aid of marketing and advertising professionals who had extensive experience in designing and implementing successful, court-approved notice programs in a variety of significant class actions, including the ***Domestic Air Transportation Antitrust Litigation***, ***Silicone Gel Breast Implant Litigation***, ***Roberts v. Bausch & Lomb***, ***In re Exxon Valdez Oil Spill Litigation***, ***Johnson v. Nissan Motors Corp.***, and ***School Asbestos Litigation*** cases. In fact, the ***Cox*** and ***Spencer*** courts found that the respective notice campaigns were more comprehensive in design and scope than other class action notice programs which have been successfully used in similar large consumer and product liability actions.

The notice programs encompassed separate components: (1) "paid advertising" (*e.g.* national network and cable television, national consumer publications, and daily and weekly newspapers and magazines); (2) "direct mail" (*e.g.* notice packages mailed to all identified or reasonably identifiable class members, as well as notice packages with more detailed information sent to potential class members who identified themselves by responding via written request or by calling the toll-free number); and (3) "earned media" (*e.g.* press conferences, press releases, articles, and other materials prepared especially for print and electronic distribution and targeted towards consumer affairs reports).

Notices on network and cable television and in national publications were distributed in all 50 states, including South Carolina. Additional advertising was undertaken specifically in South Carolina. In fact, South Carolina was one of the states specifically targeted by the notice experts. Notices appeared in numerous daily, weekly, and monthly newspapers in South Carolina with a combined circulation that exceeded 800,000 persons. The publications included the *Post and Courier*, the *Independent Mail*, *The State*, and the Florence *Morning News*, in addition to the national publications with wide distribution in South Carolina such as both *People* and *Parade* magazines. Individual notices were mailed to over 244,756 South Carolina property owners. Packets were mailed to persons with South Carolina addresses in response to their phoning an 800 telephone number for information on the proposed settlement.

At the fairness hearings, professional class notice providers and media experts testified about the enormous efforts undertaken to notify potential class members of the proposed settlements.

The ***Cox*** and ***Spencer*** courts having [sic] determined that the notices met the requirements of due process, under ***Matsushita*** and ***Epstein II***. The Plaintiffs should not [sic] permitted to relitigate the issue by bringing this lawsuit. As the court in ***Epstein II*** wrote, "***Matsushita*** itself indicated that broad collateral review of the adequacy of representation (*or of the other due process requirements for binding absent class members*) is not available." 179 F.3d at 649 (emphasis added). Rather, collateral review is limited to determining whether the procedures followed in the prior litigation resulted in a "full and fair opportunity" to litigate the issues. In ***Cox*** and ***Spencer*** there were

opportunities for interested parties to contest the adequacy of the notice, and the court findings regarding the adequacy of the notice are not subject to further collateral attack.

Neither the ***Cox*** and [sic] ***Spencer*** notice programs violated the Plaintiff's due process rights because individual notices were not mailed to all class members. Individual notice is not necessarily required to meet the requirements of due process. The multi-media notice campaign designed for these cases represented the "best practicable" notice. Not all Settlement Class members were known or readily identifiable. The Plaintiffs should not be allowed to base this claim that individual notice is required.

(B)

In ***Shutts*** the Supreme Court held only that "[t]he notice must be the *best practicable* and reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Shutts***, 472 U.S. at 812 (emphasis added). Thus, the ***Shutts*** court implicitly acknowledged that individual notice to every putative class member may not always be possible. Likewise, the South Carolina Supreme Court has held that publication alone is sufficient under South Carolina Rule of Civil Procedure 23 and under state and federal constitutional guidelines if there is "no way personally to notify many of the class members." ***South Carolina Pub. Serv. Auth. v. Citizens & Southern Nat'l Bank of S.C.***, 300 S.C. 142, 158, 386 S.E.2d 775, 785 (S.C. 1989) (a post-***Shutts*** decision); ***Premium Inv. Corp. v. Green***, 283 S.C. 464,

475, 324 S.E.2d 72, 78 (S.C. Ct. App. 1989) (a post-***Shutts*** decision).

The case law supports the conclusion that under ***Shutts*** there is no requirement of individual notice where such notice is not practical or reasonable under the circumstances. In ***In re Domestic Air Transp. Antitrust Litig.***, 141 F.R.D. at 539. In ***In Re Agent Orange Prod. Liab. Litig.***, 818 F.2d 145, 168-69 (2d Cir. 1987), the Second Circuit rejected the argument that all 2.4 million Vietnam veterans potentially exposed to Agent Orange must receive individual letter notice of a pending class action.

Other courts have also concluded that individual notice is not required for a notice to be adequate, except when class members can be readily identified. *See, e.g.*, ***Fry v. Hayt, Hayt & Landau***, 198 F.R.D. 461, 474 (E.D. Pa. 2000) (citing ***Eisen*** and ***Mullane*** and concluding that individual notice to class members is only required when the plaintiff knows or can easily determine names and addresses through reasonable efforts; for all others, notice by publication suffices under Rule 23 and the due process clause); ***US West, Inc. v. Business Discount Plan, Inc.***, 196 F.R.D. 576, 582 (D. Colo. 2000) (individual notice is mandatory for class members who can be identified through reasonable effort); ***Carlough v. Amchem Prod.***, 158 F.R.D. 314, 321-23 (E.D. Pa. 1993) (approving a multimedia class notice program involving a toll-free phone number, paid advertising in national publications, television ads, unpaid advertising via public service announcements and press releases for potential class members whose names and addresses could not be ascertained through other reasonable efforts).

The ***Cox*** and ***Spencer*** courts analyzed the circumstances and determined that not all Settlement Class members were readily identifiable. Having drawn that conclusion, the courts considered the available options and reasonably concluded in its discretion that the campaign designed by experienced class notice experts complied with the ***Shutts*** standard of giving "the best notice practicable under the circumstances . . . to members of the Settlement Class."

> Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g.*, ***In re Domestic Air Transportation Antitrust Litigation***, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); ***In re Silicone Gel Breast Implant Products Liability Litigation***, MDL 926 (N.D. Ala. 1994); ***Roberts v. Bausch & Lomb, Inc.***, 94-C-1144-W (N.D. Ala. 1995).

The ***Spencer*** considered the notice program and concluded

> Based upon the affidavit of Wayne L. Pines and those of class counsel, the Court finds that the means of disseminating the notice was the best practicable, reasonably calculated under all the circumstances to apprise interested parties. . . .

(C)

The record clearly reveals that the ***Cox*** and ***Spencer*** courts carefully considered the issue of how to best provide

notice to unknown class members and that the issue was fully and fairly litigated. As such, their decisions that the respective notice campaigns provided the best practicable notice under all the circumstances are not subject to relitigation in this Court, and the Plaintiffs' argument provides no basis for denying full faith and credit to the ***Cox*** or ***Spencer*** judgments.

Shutts does not require that notice be actually received, nor do subsequent cases interpret it to contain such a requirement. In ***Silber v. Mabon***, 18 F.3d 1449 (9th Cir. 1994), the Ninth Circuit addressed whether an absent member of a securities litigation class was denied due process because he never received actual notice of the class action. The absent member, Argyris, argued that ***Shutts*** not only requires that notice must be given, but also that the absent class member must actually receive the notice. ***Id.*** at 1451. The ***Silber*** court explicitly rejected this argument, holding that Argyris was not denied due process, particularly under the standard articulated in ***Shutts***:

> We do not believe that ***Shutts*** changes the traditional standard for class notice from "best practicable" to "actually received" notice. No Rule 23(b)(3) case has so construed ***Shutts***. ***Shutts*** was concerned with the different problem of implied consent to jurisdiction when a class member fails to opt out of the class. Even so, the notice obligation was defined by reference to ***Mullane*** and ***Eisen***, neither of which requires actual receipt.

Id. at 1454. As the ***Silber*** court noted, "[m]ost post-***Shutts*** opinions dealing with the constitutionality of class-notice procedures under Rule 23 fail to mention it, and all continue

to uphold the validity of the notice procedures" utilized before the ***Shutts*** case was decided (*i.e.* actual receipt of notice not required). ***Id.*** at n.3; *see also* ***Fry***, 198 F.R.D. at 474 ("due process does not require that every class member receive actual [individual] notice, and, therefore, failure to receive notice is not fatal to the [notice] plan"); ***In re Prudential Ins. Co. of Am. Sales Practices Litig.***, 177 F.R.D. 216, 230-33 (D.N.J. 1997) (rejecting argument that failure to receive individual notice means notice by publication violates due process and the requirements of Rule 23 and noting that "due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties"); ***In re Prudential Sec. Ltd. Partnerships Litig.***, 164 F.R.D. 362, 368 (S.D.N.Y.) ("for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected"), *aff'd without opinion*, 107 F.3d 3 (2d Cir. 1996); ***Gross v. Barnett Banks, Inc.***, 934 F. Supp. 1340, 1344-45 (M.D. Fla. 1995) (rejecting absent class member's argument that notice violated due process because she did not actually receive notice mailed to her former address); ***Weigner v. City of New York***, 852 F.2d 646, 649 (2d Cir. 1988) ("[t]he proper inquiry is whether [one] acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice"), *cert. denied*, 488 U.S. 1005 (1989); ***In re Prudential Sec. Ltd. Partnerships Litig.***, 947 F. Supp. 750, 755-56 (S.D.N.Y. 1996) ("a class action settlement is binding on an absent class member if the notice program is procedurally adequate, even if the absent class member does not receive personal written notice").

The second procedural safeguard enumerated in ***Shutts*** is an opportunity by putative class members to be heard and participate in the litigation. 472 U.S. at 812. The findings demonstrate conclusively that this requirement was met. Potential class members were notified of the hearing and their right to participate. Both notices contained clear information.

Accordingly, this element of due process was clearly met.

> Due process also requires that an absent plaintiff be given an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. ***Shutts***, 472 U.S. at 810-11. Because the classes were certified as "voluntary" or "opt out" classes, each class member was given the unequivocal right to exclude himself from the class.

The notice advised class members of their right to opt out as well as the procedures and deadline for doing so. In addition, the notice advised class members of the consequences of failing to opt out. In their Final Orders, the ***Cox*** and ***Spencer*** courts confirmed that "[t]he members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class."

(D)

The Plaintiffs allege there was inadequate representation of the national class by both class counsel and the named class representatives. The Plaintiffs assert primarily that (1) "disabling conflicts" existed between class counsel and class members such that class counsel's

representation was inadequate; (2) class counsel conducted themselves improperly; and (3) the named plaintiffs could not adequately represent all potential claimants such that the use of subclasses was required.

By filing this suit, the Plaintiffs now urge the Court to make an independent evaluation of the adequacy of representation. However, ***Matsushita*** makes clear that "broad collateral review of the adequacy of representation . . . is not available." ***Epstein II***, 179 F.3d at 649. Rather, the issue is determined by reviewing the findings of the court rendering the judgment. ***Id.*** In this case the courts found that the adequacy requirement under those states rules were satisfied. Under ***Matsushita*** and ***Epstein II*** no "second-guessing" of that determination is allowed. ***Id.*** at 648.

Plaintiffs contend that the ***Cox*** and ***Spencer*** judgments must fail even if ***Epstein III*** and ***Matsushita*** mean that a subsequent reviewing court must limit its review to the issue of determining whether the rendering court applied procedures that reasonably ensured due process to class members. In general, Plaintiffs' complaints relate either to the adequacy (or manner) of the notices or the substantive content of the notices. They argue that the courts did not fully and fairly decide the relevant due process issues such that it did not have jurisdiction over them and therefore, its judgment cannot be granted full faith and credit.

The court disagrees. As the Defendants have demonstrated, there was ample opportunity for interested parties to contest the adequacy and content of the class notice, and the courts' findings are not subject to collateral attack

in this Court. The relevant due process issues were fully and fairly litigated and are not subject to relitigation here.

The Plaintiffs may argue that ***Cox*** and ***Spencer*** class counsel suffered a "disabling conflict of interest" because they were allegedly more concerned about their fees than the interests of the class. This is the same argument that the rival Epstein appellants advanced in ***Epstein II*** and that the Ninth Circuit held was precluded by the Delaware Chancery Court's findings that the Delaware plaintiffs adequately represented the class. The same result should obtain herein.

The conduct of class counsel was overseen by not one, but two courts. In addition, acting as a settlement judge, Judge Richard Silver of the Monterey Superior Court in California actively supervised the negotiations among ***Cox*** counsel, ***Spencer*** counsel, and the Defendants. In that capacity he was specifically alert to the possibility of conflict between class counsel and the class over the subject of attorneys fees. In his November 8, 1995 report he wrote:

> Before I would agree to recommend the settlement, it would have to meet a class fairness standard. I felt this essential to insure that the resolution of the differences did not turn on attorneys fees. . . .
>
> * * *
>
> Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

Under ***Matsushita*** and ***Epstein II*** these findings completely answer any argument about an alleged conflict of interest.

The Settlement Agreement were [sic] reached as the result of good faith, arms' length and non-collusive negotiations. The court heard testimony on every aspect of the Settlement Agreement. These aspects had been the "subject of intense preparation and negotiation, from the amounts, to the terms, to the amount of leaks, to who was covered, to how long they would be covered, [all] was gone over in detail" in arms-length negotiations. Moreover, as noted previously, the settlement that ultimately emerged was the culmination of a two-week settlement conference overseen by Judge Silver in which numerous enhancements to the original settlement were achieved for the benefit of the class. Judge Silver's own report verifies that class counsel conducted themselves properly and that no extraneous elements – such as attorneys fees or class counsel's individual cases – affected the negotiation of the class settlement.[10]

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[10] With respect to the claim that one of the ***Spencer*** class counsel suffered a "disabling conflict" by virtue of his simultaneous settlement of his individual cases, Judge Silver wrote,

> I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not be

(Continued on following page)

In its Final Order the ***Cox*** court also found that, "[t]he ***Cox*** Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case."

Any challenge to the adequacy of representation in ***Cox*** would be analogous to the challenge to representation mounted by the appellants in ***Epstein II***. In such instances, the "challenge to the adequacy of representation in the [initial] proceedings [is] answered *by specific reference to the findings made on the issue in those proceedings.*" ***Epstein II***, 179 F.3d at 650. Thus, the courts' findings clearly are dispositive on this issue.

Plaintiffs complain at length that the ***Cox*** notice did not disclose (1) a $30 million fee payment to ***Spencer*** class counsel, (2) the assignment of the ***Spencer*** settlement proceeds to the ***Cox*** fund, which allegedly reduced the value of the ***Cox*** settlement, and (3) the resulting alleged conflicts of interest. Similar, if not identical, complaints were raised by an objector to the ***Cox*** settlement, and was addressed by that court. The ***Cox*** court specifically stated that it considered *all* objections to the ***Cox*** Settlement:

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improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement. It was I who always kept us concentrated on global settlement.

Similarly, the ***Cox*** court found that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the ***Cox*** settlement." (Ex. 2 at p. 18, ¶ 66). Inasmuch as the specific issue was fully and fairly litigated in ***Cox***, it may not be relitigated here. ***Epstein II***, 179 F.3d at 648-49.

> In independently determining to approve the Settlement and the Application [for fees], the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

The Court rejected objections relating to the ***Spencer*** assignment and the alleged effect payment of attorneys' fees to ***Spencer*** counsel would have on the ***Cox*** fund:

> Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against DuPont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement. . . .
>
> The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against DuPont and others to defendants Shell and Celanese.
>
> Objectors are incorrect in asserting that the 'credit' arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against DuPont, regardless of whether DuPont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

Because the various arguments and objections relating to the ***Spencer*** settlement and fee payment were fully

and fairly considered and litigated in the ***Cox*** court, they are not subject to relitigation in this Court and cannot form any basis for denying full faith and credit to the ***Cox*** judgment.

The Plaintiffs argue that under the Supreme Court's decision in ***Amchem Products, Inc. v Windsor***, 521 U.S. 591 (1997), the class representatives could not adequately represent the whole class. The class should not have been divided into sub-classes each with its own representative. For several reasons ***Amchem*** presents no bar to extending full faith and credit to the ***Cox*** and ***Spencer*** judgments.

First, ***Amchem*** was not decided until more than 18 months *after* the rendition of the final judgments in ***Cox*** and ***Spencer***. Accordingly, it has no legal effect on the final judgments. Moreover, even if the judgments were deemed erroneous in any respect on account of the subsequent decision in ***Amchem***, they nonetheless are entitled to full faith and credit under the Constitution. *See* ***Lops v. Lops***, 140 F.3d 927, (11th Cir. 1998) (noting that, under full faith and credit, judgments generally should be respected even when erroneous); ***Brady, Texas, Municipal Gas Corp. v. City of Brady***, 936 F.2d 212, 220-21 (5th Cir. 1991) (erroneous state court judgment entitled to full faith and credit because it would be valid in rendering state); ***Turnbow v. Pacific Mut. Life Ins. Co.***, 934 F.2d 1100, 1103-04 (9th Cir. 1991); ***Berry v. Demers***, 1995 WL 406091 at *7 (S.D.N.Y. 1995) ("the full faith and credit statute contains no exception for erroneous decisions").

Second, ***Amchem*** was a direct appeal from a judgment approving a class settlement. ***Amchem*** therefore provides no guidance to a court hearing a collateral attack on a judgment approving a class settlement. Rather,

Matsushita and ***Epstein II*** are the controlling authorities on collateral review. That determination is for the court rendering the judgment and to those courts to which a direct appeal from the judgment lies. Under ***Matsushita*** and ***Epstein II*** that determination is not subject to "second-guessing."

Third, there was not present in these settlements the conflict of interest between class members who had already suffered damage and those who might do so in the future, that led the Court in ***Amchem*** to require the use of subclasses. In ***Amchem*** the Court found that a conflict of interest existed between the named plaintiffs, who had already contracted asbestos-related diseases, and those class members who had been exposed but who had not yet exhibited symptoms of disease ("exposure only" plaintiffs). 521 U.S. at 627-28. The class settlement in ***Amchem*** provided for payments in a fixed range for various categories of illnesses without any adjustment for future inflation. The settlement also capped the number of claims payable in each category in a given year and limited the number of opt outs in future years. ***Id.*** at 626-27. The Supreme Court agreed with the Third Circuit that this created an irreconcilable conflict between the currently injured, whose primary interest would be generous immediate payments, and those only exposed but who had yet to suffer any injury, who would be more interested in assuming an ample inflation-protected fund for the future. ***Id.*** at 626.

The ***Cox*** and ***Spencer*** settlements create no such conflict. There is no cap on the number of claims payable. Moreover, the $950 million settlement amount represents only a *minimum* contribution (*i.e.*, the fund may grow if the number of claims so requires). Inflation is not an issue:

future eligible claimants are entitled to relief. The ***Cox*** settlement provides for renoticing the class every three years in the future and a corresponding right of future homeowners to opt out. The ***Spencer*** settlement provides similarly. Because future claimants were not prejudiced at all in these settlements, there was no antagonism within the class such that the named class representatives could not adequately represent the whole class.

IV.

For the reasons set forth above this Court must extend full faith and credit to the ***Cox*** and ***Spencer*** judgments. Once that is done, the Plaintiffs' claims in this case are barred. Therefore the Defendants are entitled as a matter of law to a judgment dismissing the Plaintiffs' claims with prejudice, and

IT IS SO ORDERED

/s/ _____
The Honorable
R. Markley Dennis, Jr.
Presiding Judge of the
Ninth Judicial Circuit

Moncks Corner, South Carolina
Dated: June 14, 2002

28 U.S.C.A. § 1738

1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United State, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken

an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al., Plaintiffs, v. SHELL OIL COMPANY, et al., Defendants. (formerly HOWARD v. SHELL)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIVIL ACTION NO. 95-CP-10-1948 **AFFIDAVIT OF THOMAS C. BELLINO, JR.**

I, Thomas C. Bellino, Jr., after being duly sworn, state as follows:

* * *

Since 1989, I have participated in the construction of well over two hundred (200) single family dwellings. Almost all of these buildings were constructed with polybutylene plumbing systems. Additionally, I am married to Tammy S. McCutcheon, who is the owner of three (3) dwellings containing polybutylene plumbing systems. Our primary residence located at 1358 Hidden Lakes Drive, Mt. Pleasant, South Carolina, being a twenty-eight hundred, fifty (2,850) square foot single family residence contains polybutylene plumbing. My wife also owns two (2) rental units, 1123 Aster Drive, Mt. Pleasant, South Carolina being an eleven hundred (1,100) square foot family residence, and 454 St. Charles Place, Charleston, South Carolina, being a one thousand (1,000) square foot townhouse, both of which contain polybutylene plumbing systems.

The State of South Carolina through the Department of Labor, Licensing, and Regulation Board, maintains a list of all licensed contractors in the state of South Carolina. The list of licensed contractors is published yearly in several volumes and distributed to towns and various other interested parties for a nominal fee. I have been listed in this publication since my licensing in 1989. Mailing lists are available from the Department of Labor, Licensing, and Regulation Board as well.

Despite the fact that the names, addresses and phone numbers of all licensed contractors are readily available through the state, I have never received any notice of any class action regarding polybutylene piping systems. Although recently I have heard, through word of mouth, that such a class action existed, I have never seen in any media any such notice. Specifically, I have never seen any television advertisement, never heard any radio advertisement, or seen any printed advertisement regarding the existence of a class action, the settlement thereof, or the ability to opt out of the class action. I have not seen in any trade publication, and have not been mailed any notice indicating the existence of the class action.

I have never been asked to notify any of the owners of the residences which I have constructed of the existence of the class action, and have never received any ability to opt out of the class action. My wife, Tammy S. McCutcheon, who is the owner of three (3) units containing polybutylene plumbing systems, has never received any such notice.

I have recently been informed of the existence of a class action in Tennessee purporting to have nationwide affect, and have further been informed that the ability to opt out of this purported class action was a short period

during September and October of 1995. Although I was actively engaged in installing polybutylene plumbing systems in houses which I was building at the time, I never received any notice concerning the class action or the ability to opt out. Consequently, I could not inform home buyers at the time or after that time about the polybutylene plumbing systems.

I understand that a media campaign was supposedly conducted with respect to a notice of a class action. Although my wife and I certainly fall into the demographic group targeted, we were not reached by any notice of the class action. In my opinion as a licensed contractor engaged in construction of dwellings containing polybutylene systems, the best and most practical method of getting notice to the owners of such units is by obtaining information through the plumbing supply houses and the South Carolina Labor, License, and Regulation Board. Each time polybutylene pipe is ordered and billed out by the plumbing supply houses, all of whom keep computer records to my knowledge, the plumbing supply houses generate bills which indicate not only the contractor or plumbing contractor, but also the address and sometimes the owner of the unit. This is done in order to differentiate which jobs and which units the plumbing is being sold for in order that financial records can be kept with respect to each unit. This information is readily obtainable from plumbing supply houses, and would indicate where polybutylene was installed.

Another notice method which would produce great success would be to obtain a mailing list from the South Carolina Labor, Licensing, and Regulation Board for all licensed contractors in the state of South Carolina. Had I received a request for information from polybutylene pipe

manufacturers, I would have easily been able to provide a list of the location [sic] of each home built by any of the companies for which I worked, and the initial purchaser of the home. Having worked for numerous general contractors, it is my opinion that all contractors would keep such information which would be readily available. In that manner, either through the plumbing supply houses, or through the contractors, or a combination of both, it is my opinion that almost all units containing polybutylene pipe systems could be identified.

There is a small number of large tract home builders which have built subdivisions, apartment complexes and other large scale developments in South Carolina. Some of these builders include Centex Homes, John Wieland Homes, and Don Galloway Homes. These large scale tract builders maintain records of addresses and names of the purchasers of units, and could also provide homeowners association addresses which would provide current owners of the units with polybutylene. Some of these tract builders have built thousands and perhaps hundreds of thousands of units containing polybutylene. Therefore, a large portion of the units containing polybutylene pipe could be ascertained by contacting just a few large scale developers/contractors and/or the homeowners associations for the developments. To my knowledge, none of this notification process was ever undertaken by the polybutylene group.

It is my opinion that the method of notification undertaken, being media notice, is not the best, and is probably one of the least effective methods of notification of this type [sic] problem. For many units which are built on slabs, it would be impossible to ascertain the type of pipe without contacting the builder. For a number of units that have exposed plumbing under sinks and near hot water heaters,

plumbing contractors used copper from the sink or water heater to the interior of the wall where it is connected to polybutylene, which is the primary plumbing system of the unit. An unskilled homeowner looking at such pipe would think that they have copper pipe in the house when they really had polybutylene.

In summary, I am engaged in the construction business and have utilized polybutylene plumbing systems as primary systems in over two hundred (200) dwellings since 1989. My wife is the owner of three (3) such units currently. I have never received notice in any form of the Tennessee class action or the ability to opt out of the Tennessee class action, until I was contacted by members of the suit pending in South Carolina within the last few months. It is my opinion that the notification method used by the polybutylene group was ineffective. The best method available, utilizing the plumbing supply houses and the contractors to ascertain and provide actual notice to people with the systems, was not utilized.

FURTHER DEPONENT SAYETH NOT.

/s/

THOMAS C. BELLINO, JR.

SWORN to before me this
17th day of November, 1997.

NOTARY PUBLIC FOR SOUTH CAROLINA

/s/

My Commission Exp.: 1/14/98

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) HOSPITALITY MANAGEMENT) ASSOCIATES, INC., et al.,)) Plaintiffs,)) vs.)) SHELL OIL COMPANY, et al.,)) Defendant.)) (formerly HOWARD v. SHELL))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 95-CP-10-1948 **AFFIDAVIT OF MICHAEL S. BRUSSEAU**

I, Michael S. Brusseau, after being duly sworn, states [sic] as follows:

* * *

I am employed as the Maintenance Supervisor for Paces Watch Apartment Community, located at 997 Highway 17 Bypass, Mt. Pleasant, South Carolina.

* * *

There are two hundred thirty-five (235) units in Paces Watch, including the club house and maintenance facility. During the entire time I have worked at Paces Watch, we have had a horrendous experience with leaks from polybutylene piping. A majority of the units in Paces Watch have experienced leaks, numbering over one hundred eighty (180) different leaks to date. Most of the leaks have occurred in the utility closets which house the air conditioning/heating units and hot water heaters. Most leaks occurred in the couplings attaching the pipe, although some leaks occurred in the pipes themselves, which cracked. Most of the leaks occurred near hot water heaters and most leaks occurred behind sheetrock in either the

walls or ceilings. A fair number of leaks occurred in pipes near sinks and toilets.

As a result of the leaks, we have had damage to numerous places in the wallboard and the leaks also damaged property of tenants. One particular leak in the clubhouse knocked out the security system for the entire complex, causing problems with many of the tenants. On several occasions, we had to prorate a tenant's rent for the inconvenience caused by the repairs of polybutylene leaks.

In November, 1995 I went to visit my sister in Wilton, New Hampshire during my vacation. I happened to see on television an 800 number dealing with polybutylene plumbing problems. I called my office in South Carolina and left myself a message with the number. When I got back to South Carolina, I called the number, which turned out to be the number for a company called the Plumbing Claims Group, Inc. (PCG), located in Plano, Texas. The PCG operator told me to contact Crawford and Company, a local adjusting firm, who was the only authorized representative of PCG in this area, and gave me their number. PCG also sent a pamphlet to me about PCG, along with a color sheet detailing various kinds of couplings and pipes. I now know that the PCG was a voluntary claims facility put together by some of the polybutylene manufacturers.

I contacted Crawford and Company and left my name and number. An adjuster named Tom Dale contacted me, and I told him about the numerous leaks and extensive damage we had had from polybutylene leaks. I discussed with him not only the leaks at Paces Watch, but also the leaks at other Apartment Communities owned by the same company, such as Paces Run located in Columbia, South Carolina, which were having similar problems. While

working with Mr. Dale, I forwarded numerous pictures and did extensive research into the timing of the various leaks, the damage caused by the leaks, and the repairs made. I discussed the claim with Mr. Dale after he received and reviewed these materials, and he assured me that everything was fine and that he had all the information he needed, which had been forwarded to PCG in Texas. Mr. Dale, who represented PCG, told me that a number of apartment complexes with fewer leaks and less damage had been totally replumbed. He assured me that all of our damages would be covered and that Paces Watch would be eligible for a complete replumb of over two hundred (200) of its units. Mr. Dale even indicated that the estimated cost of the replumb was about $800,000.00. He further assured me that the claim was complete and being processed in Texas.

In February, 1996, I received a letter from the Consumer Plumbing Recovery Center (CPRC), which I did not understand, which appeared to request resubmission of the claim on a form included with the letter entitled "Claim Eligibility Form." The letter stated that CPRC "took over the operations" of PCG as of January 1, 1996. I immediately called Mr. Dale, and he reassured me that the claim was complete, and not to resubmit anything. Later, in June, 1996, I received another request for the submission of the same "Claim Eligibility Form." I called Mr. Dale again and he told me again that I did not have to do anything, but if I wanted to, I could fill out the front of the form and refer to the materials already submitted, which I did, by the end of June, 1996.

On August 26, 1996, I received a call from another adjuster at Crawford and Company, named H.C. "Chuck" Herring, Jr. Mr. Herring told me that Mr. Dale would no

longer be handling the claim. Mr. Herring told me that the "rules had changed" for the claims and that there were different criteria for leaks which would qualify units for replumbing and expense reimbursement. He told me that Mr. Dale had filed the claim incorrectly, that our file was lost, and that we would have to start from scratch with the claim. As I stated, I had been assured and reassured for over five (5) months that our claim was complete, and was being processed for a complete replumb.

For the first time in the process, Mr. Herring indicated that various filing deadlines and other deadlines had been imposed, and I later found out that August 21, 1996 was one deadline. Conveniently, Mr. Herring did not call me until after the deadline to indicate that our claim was incorrectly file [sic] by his company. I was *not* told that any class action lawsuit had been filed or settled, or that we had any right to opt out of the process. In fact, the first indication I received that any lawsuit existed was the letter dated February 6, 1996 from the CPRC, which I had not heard of until the letter. The letter stated that a class action lawsuit had been finalized, that our PCG claim was being "closed," and that we would have to file a new claim with the CPRC. Mr. Dale told me that the previous submission was adequate and not to refile. We were never notified that we could opt out of the finalized class action.

* * *

Mr. Herring then informed us that only six (6) units now qualified for replumbs, and many expenses would not be repaid. This was much worse than what was indicated by Mr. Dale on behalf of PCG and CPRC, and I asked to see the adjustments and the rest of our file. When I asked to

see what was in the Paces Watch file, Mr. Herring refused to let me see any of the file.

* * *

Thereafter, I received several notices concerning polybutylene in the mail, copies of all of which are attached, but none of the notices notified me of any right to opt out of the class action. In fact, I now know that these notices were mailed long after the October 20, 1995 opt out date anyway. I have never seen any notices or advertisements in the State of South Carolina concerning polybutylene pipe in any media. I have never seen any notices or advertisements concerning polybutylene on television, except the PCG notice I saw in New Hampshire. I have never heard on the radio nor seen in print in the media any notices or advertisements concerning polybutylene. We were not informed of the ability to opt out of the class action until my attorney told me about it in 1997.

The first the [sic] notification I received concerning the existence of the class action was the CPRC letter of February 6, 1996, which I have now learned was mailed months after the opt out deadline passed on October 20, 1995. Had I received notice that Paces Watch could have opted out of the class action, I certainly would have discussed the notice with our attorney. Given the convoluted and insufficient nature of the terms of the CPRC process, had we been given the choice, all of the Apartment Communities owned by the company I work for would have been opted out of the class action.

After the CPRC "took over" the handling of our claim, the adjustment process became very adversarial and difficult. It appears to me that the goal of the CPRC through Crawford and Company is to make the process as

difficult, complicated, and lengthy as possible in order to wear us down and therefore save money on our claim. It is often easier and faster to repair the leaks ourselves than to mess with the CPRC. Mr. Herring no longer returns my telephone calls, and has threatened to "close our claim" because we will not sign a release of our rights in the South Carolina action. The only workable solution for our problem with defective polybutylene pipe and fitting is to get the funds to replace the defective plumbing and handle it ourselves. We have found the CPRC process to be a nightmare and unacceptable.

The CPRC process is also inadequate in many respects. First there is the problem of having our leaks found to be "qualified leaks." A number of our serious problems are not covered by the manipulation of this term. Also, the benefits to be paid are less than the damage we suffer. For instance, we do not get paid for lost rental income, or for costs associated with putting our renters up during the repair process. Our apartments rent for $570.00-830.00 per month, and we have lost and will lose rental income during repairs. In wallpapered units, we are having to strip the wallpaper and paint the entire units because we cannot match the wallpaper. If the entire apartment complex were to be sold, the presence of polybutylene plumbing would [sic] detrimental in the eyes of a buyer, and the market value of the entire complex is diminished.

Repairing the leaks piecemeal is much more difficult and time consuming than replumbing the entire apartment buildings one at a time. Of course, replumbing would involve loss of income and actual cost of finding other accommodations for renters for at least one month, but we should be entitled to a fair and expedited recovery. These leaks continue to occur, and eventually either time will

run out on us, or all of the pipe will have to be replaced. We are stuck in the CPRC process because we were not notified of the class action, the terms of the settlement, or the ability to opt out of it, even though we were on the PCG mailing list. We feel that this situation could not [sic] acceptable under our system of justice, and request that the Court allow us to get out of the CPRC mandates and provide fair and adequate compensation for the losses we have suffered without oppressive supervision by the companies that made the defective pipe and fittings in the first place.

FURTHER DEPONENT SAYETH NOT.

/s/

Michael S. Brusseau

SWORN to before me this
14th day of November, 1997.

NOTARY PUBLIC FOR SOUTH CAROLINA

/s/

My Commission Expires: 3/18/2007

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) HOSPITALITY MANAGEMENT) ASSOCIATES, INC., et al.,)) Plaintiffs,)) vs.)) SHELL OIL COMPANY, et al.,)) Defendant.)) (formerly HOWARD v. SHELL))	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **AFFIDAVIT OF VICTOR APAT**

Before me appeared the undersigned, who first being duly sworn, stated as follows:

My name is VICTOR APAT, and I am a Plaintiff in the above action, both individually and as a partner in R & A Partners . . . I have lived in the Charleston area since 1983. I received a Bachelor of Science Degree in Building Construction, and a Masters Degree in Civil Engineering from Virginia Tech University in 1982 and 1983, respectively.

* * *

During my career, I have built and supervised the construction of hundreds, and perhaps over one thousand structures in the Charleston area. My building experience includes residential houses, cottages, storage sheds, office buildings, R&D buildings, school buildings, complex commercial roof systems, sewer systems, nursing and medical facilities, and the MUSC Wellness Center. In my experience as a commercial and residential contractor, I am familiar with plumbing systems generally and polybutylene plumbing systems specifically. A great number of the structures built by my company and by the other

companies I have worked for contain polybutylene plumbing systems. I currently own two (2) residences in Charleston which are plumbed with polybutylene. My present home at 2272 Portside Way, and my previous home at 39 Ripplemore Drive, which I still own and lease, both contain polybutylene plumbing systems.

As a result of my experience and position, I am keenly aware of issues which affect the building industry. I am on the mailing lists of building and contracting trade and licensing groups, including the State of South Carolina Board of Labor, Licensing and Regulation. I regularly subscribe to and read trade publications such as "Qualified Remodeler," "Dixie Contractor," "Construction Monthly," and "Building Products Magazine." I regularly consult with plumbing subcontractors about materials and fittings. I have utilized polybutylene plumbing systems extensively in construction, and do in fact own two homes plumbed with polybutylene. I own two (2) office buildings and warehouses with polybutylene systems. R & A Partners owns eight (8) office buildings containing polybutylene systems.

Despite all of the foregoing, I did not receive notice of the proposed class settlements in the Tennessee or Alabama class actions or my right to opt out of the settlements until after the opt out period expired. Despite being a builder and having purchased and installed thousands of feet of polybutylene pipe, a friend of mine is the one who informed me about one of the class actions by faxing me a newspaper article after October 20, 1995, the opt out date. After receiving the article, I immediately attempted to file an opt out in one of the actions, but, my first notice of the action came after the opt out deadline had passed.

Through my professional experience, I am very familiar with the practices common in the building industry, including the sale and installation of plumbing system components, and the tracking of such sales. There are a relative few plumbing supply distributors in any given area. Most plumbing contractors in the area, and certainly all large plumbing contractors, have a general trade account at a distributor. When plumbing supplies are bought on the account, the distributor usually notes the address of the structure for the delivery of plumbing system components to specific building locations. Even when plumbing supplies are delivered to a contractor's warehouse, and not to a specific jobsite, the project location is usually indicated. The designation of the jobsite on the invoice aids the contractor in assigning the costs of materials to the correct project for financial and pricing purposes. This is a selling point for the plumbing supply distributor, and, to the best of my knowledge, all of the distributors my company deal [sic] with have this practice.

Even if the distributor did not have the building locations on their computer records, the plumbing contractors themselves generally have reasonable records concerning, and could identify with minimal effort, most, if not all, of the buildings they have plumbed with polybutylene plumbing systems. It has been my experience that plumbing contractors generally use one kind of system for all buildings they plumb, unless the general contractor or owner specifies otherwise, which is the exception, not the norm.

Apart from the records maintained by the plumbing suppliers and contractors, to the best of my knowledge, all of the municipal governments with which I am familiar require a building permit application which specifies the

type of piping that will be used in the building. These records are available and could also be used to ascertain the location of structures with polybutylene. Furthermore, there are several trade groups in this state for contractors and plumbers which could facilitate the gathering of information with regards [sic] the location of polybutylene plumbing systems. Mailing lists can be obtained from the local and national Homebuilders Associations, or the Association of General Contractors ("AGC"), which reach almost all contractors in the state.

I believe plumbers would also be very helpful in researching their files to locate polybutylene plumbing system installations for a number of reasons. Cooperating with the replacement of these plumbing systems with more dependable piping would aid plumbers by decreasing "callbacks" on warranty items and by decreasing customer dissatisfaction with past work. Additionally, plumbers would in fact have more plumbing work available in the market due to replumbing and repairing these various facilities.

I have reviewed the so called "notice" program used by the Defendants in the class action, which was conducted through the media. It is my opinion that most laypeople, even if they saw and understood such a notice, and even if they made an investigation of their exposed pipe, would mistakenly believe they *did not* have polybutylene when they in fact did. This is true because the industry practice is to "stub out" polybutylene plumbing from the wall under sinks and around hot water heaters with short lengths of copper pipe. Most lay homeowners, upon inspection, would believe that their home was plumbed with the copper pipe entirely when, in fact, all of the plumbing except the stub outs was polybutylene. Additionally, in structures built on

concrete slab foundations, the pipe would be concealed in the slab and walls, and the type of plumbing could not be determined without cutting into the walls or breaking into the slab.

It is my opinion, based upon my experience and knowledge of the building industry, that a reasonably accurate and substantially complete list of polybutylene plumbing locations in the State of South Carolina could be compiled at a reasonable expense in a reasonable time period. The resources are available to identify almost all of the facilities and locations with polybutylene in order to give actual notice to those affected. To my knowledge, none of these resources were used.

Having made inquiry with a number of sources, it is plain to me that those responsible for notice in the polybutylene class actions did not make use of the best, most efficient, and most practical method of actually notifying the owners of buildings with defective plumbing systems. Any minimal effort would have directly reached a person in my position in plenty of time to make an informed decision about whether to opt out of the settlement. Instead, someone faxed me the notice after the opt out date. It is my opinion that the type of notice used, *i.e.* general media notice, is not an effective method of reaching individuals with polybutylene systems. In South Carolina, actual individual notification by mail to almost all such individuals would have been reasonably possible to effect and would have been the best and most practical method of notification.

I have reviewed a summary of the class action settlement process for obtaining repairs and replumbing. The most obvious problem with the process is the fact that the

structure owners are not in control of the repair/replumb process. Instead, the process is being handled by an insurance industry adjusting company charged with saving money, which has no duty to the owner. Even if work is authorized, there is no warranty provided, and the choice of contractor is made by the adjusting firm. This process creates a situation ripe for frustration and delay. The process leaves the owner at the mercy of contractors they have no control over, many of whom are individuals from another state working out of the back of their trucks, with no appreciable assets or insurance coverage. In my opinion, this process, mandated on most owners without notice, appears to serve the Defendants well while shifting the [sic] much of the burden associated with the defective pipe to the uninformed owners.

FURTHER THE AFFIANT SAYETH NOT.

/s/
VICTOR APAT

SWORN to before me this
17th day of November, 1997.

/s/

Notary Public for South Carolina
My Commission Expires: (date)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al. Plaintiffs, v. SHELL OIL COMPANY, et al., Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **Affidavit of Fleet Freeman**

The undersigned, Fleet Freeman, being first duly cautioned and sworn, states as follows:

1. That he is one of the attorneys for the plaintiffs in the above case and that in addition to the named plaintiffs, he represents 24 additional clients who are members of the putative class of owners of structures containing defective polybutylene plumbing systems. In all, my firm represents over 5,200 units, comprised mostly of multi-family dwelling units.

2. In attempting to evaluate the efficacy and propriety of the notices sent out in the *Cox* and *Spencer* class actions, which the defendants assert was adequate and the best practicable notice, I learned that there was a publication in existence in 1994 and 1995, which was then and still is readily available to any interested member of the public, a compilation of all multi-family housing for each county in the State of South Carolina. A copy of one of these representative publications entitled "MULTI-FAMILY HOUSING SURVEY" is attached hereto as Exhibit A to this affidavit.

3. A review of the attached Exhibit A reflects that there was readily available to the defendants in the *Cox* and *Spencer* class actions, a single document for each South Carolina county which reflects the number of multi-family complexes in each county, the number of units in each complex, the names and addresses of each complex, the names, telephone numbers and addresses of each resident manager and each contact person, the number of bathrooms in each unit, the number of bedrooms in each unit, the date of construction of each complex, and other pertinent data.

4. To have sent an effective notice reaching most of the plaintiffs and other members of the putative class, all the *Cox* and *Spencer* defendants needed to do was to purchase these comprehensive surveys for each county and mail notices to the persons at the addresses provided therein. Based on my calculations, such notice would have reached over 95% of my clients. It would not have been necessary to send notices to those persons whose buildings were built outside the inclusive dates of January 1, 1978 through July 31, 1995. That information was easily discernable from the survey.

The foregoing statements are true and correct to the best of my knowledge and belief.

Dated this 3rd day of December, 1997.

S/ Fleet Freeman
Fleet Freeman

Sworn and subscribed before me this 3rd day of December, 1997. /s/

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al. Plaintiffs, v. SHELL OIL COMPANY, et al., Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **Affidavit of Jeffrey A. Raines**

The undersigned, Jeffrey A. Raines, being first duly cautioned and sworn, states as follows:

1. I am the President and CEO of Insurance Claims Consultants, Incorporated (ICC), a South Carolina corporation that is in the business of adjusting insurance and related claims for customers in and outside the State of South Carolina.

2. Our company was retained to represent owners of structures containing polybutylene plumbing. After being retained we promptly notified the PCG of our involvement, and ICC then proceeded to adjust the owners' claims. Attached as Exhibit A is a copy of a typical letter sent to the PCG in behalf of our customers. The PCG hired Crawford Company, insurance industry adjusters, to adjust these claims in behalf of the manufacturers.

3. By mid-1995, ICC had been retained by customers in South Carolina, Georgia, Tennessee, Florida, North Carolina and Virginia. In each instance, we notified PCG of each owner's claim and our involvement in the process.

* * *

5. Despite the fact that ICC had notified the PCG of each of our customers' claims covering approximately 5000 units, and despite the fact that the PCG had acknowledged our correspondence concerning many if not all of these claimants, no notice was sent to ICC or any of our customers that there was a class action in Alabama or a class action in Tennessee which affected their rights of recovery, or that there was a time limit in which to opt-out of these class actions.

* * *

7. Notwithstanding the fact that the PCG had a data base with our customers' names and addresses of the affected properties, the only notice given to our customers was received by them in early 1996 long after the opt-out date. A copy of one of the typical letters of notification received by our customers advising them that their PCG file was being closed and further processing must be done under the CPRC established by Cox is attached hereto as Exhibit B. It seems to me that if the defendant manufacturers, Dupont, Shell and Hoechst Celanese, could give written notice to our customers that their PCG files were being closed, that they could have notified them of the existence of a class action which purported to take away their rights to a fair adjustment or adjudication of their claims.

* * *

S/ Jeffrey A. Raines
Jeffrey A. Raines

IN THE CHANCERY COURT
FOR OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,	§	CIVIL ACTION NO. 18,844
PLAINTIFFS,	§	CLASS ACTION
vs.	§	OBION COUNTY
SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY and HOECHST CELANESE CORPORATION,	§	
DEFENDANTS.	§	

AFFIDAVIT OF MARY LOU STRANGE

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Mary Lou Strange, known to me, who, being first duly sworn, deposed and stated on her oath as follows:

1. My name is Mary Lou Strange. I am a partner in the law firm of VINSON & ELKINS, L.L.P. I have been

licensed to practice law in the State of Oklahoma since 1983 and in the State of Texas since 1988. Since 1988 I have represented Shell Oil Company in polybutylene plumbing litigation. . . .

Class Counsel Have Settled Their Cases For Amounts Consistent With the Relief Provided in the Settlement.

2. Fleming argues that class counsel have settled other cases in which they represent individual plaintiffs on a more favorable basis than the terms of the *Cox* settlement. . . .

A. *Jim Moriarty and Steve Hackerman*

Jim Moriarty and Steve Hackerman, who have had extensive experience in polybutylene litigation, settled the claims on some 12,000 homes for $88 million – approximately $7,300 per house. This figure included 40% for attorneys' fees and 2% for the costs of litigation. Thus, the net average settlement amount per house was $4,234, approximately the cost of a replumb and some past damages.

B. *Michael Caddell*

In arriving at the $8,300 per house average settlement figure for the *Carrera* case, Fleming again fails to note that this figure includes both attorneys' fees and costs of litigation. Since neither of these items are included in the *Cox* Settlement, they should also be excluded from the *Carrera* settlement to provide the basis for an accurate comparison. Attorneys' fees and litigation costs in *Carrera* settlement to provide the basis for an accurate

comparison. Attorney's fees and litigation costs in *Carrera* totaled approximately 40% of the settlement amount. Thus, the proper figure for comparison to the *Cox* settlement is $4,980. Again, this figure represents the approximate cost to an individual of a replumb with an additional allowance for some past damages.

The Results of Trials In Polybutylene Cases Are Also Consistent With The Relief Provided in the *Cox* Settlement.

3. Fleming has listed the results of both trials and settlements in support of his argument that the *Cox* settlement is inadequate. Since factors other than the likely litigation result may influence the amount a client is willing to pay to settle a particular case, the differences between verdicts and settlements can be significant. Additionally, the settlements in three cases which were resolved without trial – ***Breaz***, ***Lazarine***, and ***Martin***, were the result of payments by multiple defendants, who settled individually. Thus, the sum of the settlements greatly exceeds the total of actual damages homeowners would have been entitled to recover at trial. The homeowners are entitled only to a single recovery, and that is exactly what is provided in the *Cox* settlement.

4. Moreover, even the jury verdicts must be evaluated in light of factors which may cause them to differ from the relief offered under the *Cox* settlement. The verdicts Fleming cites include elements of damage which should not be considered as a basis for comparison with the *Cox* settlement. For example, in the cases cited, claims based on the Texas Deceptive Trade Practices Act were submitted. The Texas Deceptive Trade Practices Act permits the recovery of attorneys' fees, automatic trebling

of the first $1,000 of actual damages, and the recovery of additional damages not more than three times the amount of actual damages in excess of $1,000. Tex. Bus. & Comm. Code § 17.50. Many of the verdicts also include awards for mental anguish. Most of the states in which the properties belonging to the *Cox* settlement members are located would not permit these types of damages. In order to compare the verdict results to the *Cox* settlement, these damages should be excluded. Thus, simply providing the court with a gross, and often inaccurate, number without explaining that substantial portions of the number may not be recoverable by members of the *Cox* settlement class is seriously misleading. (Citation omitted)

5. When the awards for attorneys' fees, which are excluded from the *Cox* settlement, and the awards for mental anguish and punitive damages, which are of doubtful validity in most states, are excluded, the remaining elements of damage awarded by the juries are comparable to the relief provided in the *Cox* settlement.

A. *Diehl*

Fleming has apparently computed the average recovery listed for the *Diehl* cased [sic] based solely on plaintiffs who actually recovered, ignoring plaintiffs who received no recovery from defendants. The average recovery for all plaintiffs was $55,000. This figure includes a $9,000 average recovery for attorneys' fees. In most states no award for attorneys' fees would be permissible for this type of action. However, not only would litigants not be entitled to recover attorney fees, they would be liable to pay their attorney based on a contingency fee contract – in Fleming's cases that is typically 40%. Thus, including the attorneys' fees in the average grossly overstates

the amount most settlement class members would be entitled to recover in litigation. Moreover, since the *Cox* settlement does not include attorneys' fees payments, attorneys' fees should not be included in any comparison.

In addition to attorneys' fees, the average recovery in *Diehl* includes $2,000 in automatic damages and $12,500 in additional damages under the Texas Deceptive Trade Practices Act, as well as $2,000 in damages for mental anguish. These damages would not be available to the vast majority of settlement class members.

In order to accurately compare the *Diehl* verdict to the *Cox* settlement, those damages should be excluded. The computation is then as follows:

$33,000	average award
-9,000	attorneys' fees
-2,000	automatic trebling
-12,500	additional damage
-2,000	mental anguish
$ 7,500	
-3,000	less 40% attorneys' fees
$ 4,500	net recovery to plaintiff

This figure is comparable to the cost of replumbing a house – precisely the relief provided in the *Cox* settlement.

B. *Kochie*

Again, Fleming has ignored the fact that some plaintiffs did not recover against any defendants in computing his average recovery. The average recovery in the *Kochie* trial was $14,700. Of this amount, $7,250 per house is included for attorneys' fees, $1,000 in automatic trebling,

and $2,500 in additional damages. When these amounts are subtracted from the average, the result is the following:

$14,700	average recovery
-7,250	attorneys' fees
-1,000	automatic trebling
-2,500	additional damage
$ 3,950	
-1,580	less 40% attorneys' fees
$ 2,370	net recovery to plaintiff

This amount is substantially less than the cost to replumb offered in the *Cox* settlement.

C. *Schmidt*

It is not clear whether Fleming has based his average damage figure on the jury's verdict or on the settlement agreement which was reached after verdict. Fleming's figure is not consistent with either one. At any rate, the average for all past damages and the cost to replace the plumbing system found by the jury was $9,400. If 40% in attorneys' fees is subtracted from this, the net recovery is $5,640. Again, this is approximately the cost an individual would pay for a replumb with some amount remaining to compensate for past damages.

D. *Babb*

The jury in **Babb** did not award punitive damages, attorneys' fees, mental anguish, or damages for permanent diminution in property value. The jury awarded only damages for past damages and the cost to replumb. The average jury award for these damages was $6,461. Apparently, Fleming based his $16,000 figure on settlements,

not on the jury's determination of damages. When attorneys' fees are subtracted from the $6,461, a net recovery of $3,877 remains. This is, once again, approximately the cost an individual would pay for a replumb. The *Cox* settlement is, therefore, consistent with this result.

E. *Patterson*

The jury found Shell was not liable to any plaintiffs in this action. However, the jury did award actual and punitive damages against other defendants. The bulk of Fleming's $32,066 average is punitive damages and mental anguish. The actual damages, excluding mental anguish, which were awarded by the jury averaged $7,780 per house. When attorneys' fees are subtracted from this number, the net recovery is $4,668. This figure would cover an individual's cost of replumbing with some allowance for past damages.

6. As the above information proves, when awards for damages such as attorneys' fees and punitive damages are excluded, plaintiffs have recovered precisely the relief provided for in the *Cox* settlement.

/s/ Mary Lou Strange
Mary Lou Strange

OPT OUTS

1. Valid (Orange Card) Opt Outs – $26,000

   Get notice they've validly opted out but can opt in and if so have extended time to file for past damages.

2. White Card Opt Outs – 200,000

   Get Notice their opt out has been invalidated by court but get a new chance to opt out – plus extended time to file past damages if they don't opt out.

3. Shell Opt Outs – 25 plus or minus

   Do nothing

4. Late filed Opt Outs – 90,000

   Orange Cards) White Cards) Multiples) Advise both that their opt out has been invalidated for not being timely; give them new notice describing enhanced benefits and an extended time to file claims for past damages.

5. Multiple Opt Outs – Tad Has

   Have divided them into category (1) and (2) and they should be treated accordingly

6. Miscellaneous – Illegible Opt Outs, etc.

   Invalidate by Judge

Order to Court setting both the above (except Item 3 which should be ignored) with list of names/addresses and approving the above treatment.

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated.	§Civil Action No. 18,844 § § §CLASS ACTION § § §OBION COUNTY §
Plaintiffs,	§
v.	§
SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY and HOECHST CELANESE CORPORATION,	§ § § §
Defendants.	§

DENIED INTERVENOR'S FOURTH MEMORANDUM REPORTING THE NUMBER OF OPT-OUTS

Now comes denied Intervenor, Tony Martin, by his undersigned attorneys herein, to advise the court of the status of the opt outs in the Cox case. The last report by Plaintiffs' Class Counsel to the Court was that only 2,000 opt-outs to the Cox settlement had been received. Plaintiffs' Class Counsel and the Defendant's cited this number of opt-outs as indicative of acceptance of the settlement offer by the class.

Recently, neither Plaintiffs' Class Counsel nor the Defendants have reported the status of the opt-outs to the Court. This is to advise the court that requests for

exclusion from the Cox class have now been filed on behalf of the owners of over 400,000 housing units. This constitutes the largest number of individuals to opt out of a class in the history of U.S. class action litigation. The number of opt outs now constitutes a multiple of three or four of the number of people who have requested relief in the class settlement.

Intervenor herein, who has been denied the right to even intervene in this suit by the Court, infers that the number of opt outs received to date is some indication of the disapproval of the actions of Plaintiffs' Class Counsel in the Cox settlement and also a disapproval of the manner in which this Court has proceeded.

Respectfully submitted,

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Tennessee Bar No. 7631
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FAX No.: (713) 621-9688

By: _____
George M. Fleming

ATTORNEYS FOR INTERVENOR

SHELL ESTIMATE OF REPLUMB LIABILITY

(1) MOBILE HOMES – Shell estimates 3 million mobile homes at a Shell estimate of $800 per mobile home	$2.4 Billion
(2) SINGLE-FAMILY HOMES – Shell estimates 1 million single-family homes at a Shell estimate of $4,000 per home	$4 Billion
(3) MULTI-FAMILY UNITS – Shell estimates 700,000 multi-unit structures (apartments, duplexes, etc.), but will not give an average cost of repair of these units. For purposes of illustration, we assume a ridiculously low estimate of $1,000 cost of replumb per unit	$700 Million
TOTAL	$7.1 Billion

SHELL CELANESE PLAINTIFFS
Principles of Agreement
Cox/Spencer Actions

This Statement of Principles of Agreement ("Principles") represents the culmination of a mandatory settlement process conducted in certain litigation pending in Obion County, Tennessee known as *Cox v. Shell, et al.* ("Cox") and pending in Greene County, Alabama known as *Spencer v. Shell, et al.* ("Spencer") between Plaintiffs' counsel and certain of the Defendants therein, Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"). These Principles, and the parties' rights and obligations thereunder, are expressly conditioned on the parties reaching agreement on final settlement documents reflecting these Principles.

1. Settlement Amount, as defined in the *Cox* Class Settlement, increased to $950 million.

* * *

7. The Alabama court retains jurisdiction over an award of attorneys' fees and expenses to *Spencer* class counsel for their work with respect to the combined *Cox/Spencer* settlement. Upon entry of the *Cox* Judgment and subject to ¶ 18, the parties agree that the application and award of fees and expenses to *Spencer* class counsel from Shell and Celanese for their work on the combined settlement shall not exceed $30 million. The parties further agree not to object to such an award.

* * *

10. All parties (including members of *Cox* and *Spencer* class counsel serving on the Official Polybutylene Claimants Committee) agree to cooperate in the development of a consensual plan in the U.S. Brass

("Brass") Bankruptcy proceeding with the elements and subject to the conditions contained in the separate agreement (the "Brass Agreement") to be entered into between Brass, Eljer Manufacturing, Inc. and Eljer Industries, Inc. ("The Eljers"), Shell, Celanese, and the *Cox/Spencer* Plaintiffs, including the following:

a. The Eljers obtain releases and injunctive relief in the *Brass Bankruptcy*;

b. The Eljers receive assurances satisfactory to The Eljers from Celanese and/or Shell relating to liability for claims arising from PB sales to date;

c. Eljer Manufacturing retains ownership of Brass;

d. When and if Brass and The Eljers receive payments for Plumbing Claims under their insurance policies, Brass and The Eljers agree to pay the *Cox* Class an amount equal to the net proceeds recovered, provided that 50% of the first $10.0 million shall be retained by The Eljers to purchase replacement insurance coverage. Brass and The Eljers agree that they will work with the *Cox* Class to determine the most effective way to pursue these claims. The parties agree to take all reasonable steps to cooperate with each other and to fulfill Brass and The Eljer's duties to cooperate with their insurance companies;

e. 17.5% of the equity in Eljer Industries, Inc. is conveyed to the *Cox* Class;

f. Upon confirmation of a plan of reorganization acceptable to The Eljers, $2.5 million will be payable by Eljer Industries, Inc. to Defendants as reimbursement or attorneys' fees to be paid to Plaintiffs' Class counsel in *Cox* and *Spencer* and 3.5 million will be payable by Eljer Industries,

Inc. to the *Cox* Class and thereafter Eljer Industries shall pay the *Cox* Class $2 million annually for ten years (without interest, with the first annual payment payable on December 31, 1996); and

k. Assignment to the *Cox* Class of 75% of net proceeds of Household litigation (subject to the approval of The Eljers' banks) and Eljer Industries will continue to fund litigation fees and expenses (joint approval required of settlement and changes in attorneys' fees arrangements).

* * *

13. The parties agree that they will withdraw or cause to be withdrawn all objections (and related appeals) filed by them or caused by them to be filed in *Cox*, including as to the settlement and the awards of attorney's fees and expenses referred to above.

* * *

17. *Cox* and *Spencer* class counsel shall use best efforts to secure dismissal of all state court polybutylene class actions in which *Cox* and *Spencer* class counsel are counsel of record.

18. In the event that DuPont does not agree to execute the attached agreement, Exhibit A or other agreement mutually acceptable to all parties that coordinates the *Spencer* settlement with the *Cox* settlement prior to the *Spencer* fairness hearing on November 17, 1995, then *Spencer* class counsel will present the modifications set forth in the attached agreement. Exhibit B or other mutually acceptable agreement and advise the court that it should not approve the settlement without the modifications. If the modifications are not approved, then the parties agree to cooperate in the pursuit of claims against

DuPont, including claims assigned to HCC and Shell under the *Cox* agreement, on terms to be negotiated promptly.

DATED: November 7, 1995

APPROVED:

/s/ Don Barrett *Cox* Class Counsel	/s/ Peter [Illegible] Hoechst-Celanese Corporation
/s/ [Illegible] *Spencer* Class Counsel	/s/ Hugh H. Sam Shell Oil Company

AGREEMENT BETWEEN HOECHST CELANESE CORPORATION, SHELL OIL COMPANY AND FLEMING, HOVENKAMP & GRAYSON

(Filed March 8, 1996)

Following a Settlement Conference held in Monterey, California, before Judge Richard M. Silver and a mediation held in Houston, Texas, before M. A. ("Mickey") Mills, this Agreement (the "Agreement") is made and entered into this the 20th day of December, 1995, by and among Hoechst Celanese Corporation ("Celanese") and Shell Oil Company ("Shell") (collectively referred to as the "Defendants") and Fleming, Hovenkamp, & Grayson, P.C. ("FH&G") on behalf of FH&G's individual plaintiffs that have polybutylene plumbing claims in lawsuits pending in Harris and surrounding counties through the State of Texas and elsewhere as described in more detail in Exhibit "A" and hereinafter referred to as the "Lawsuits."

* * *

1. *Purpose*. The purpose of this Agreement is to resolve all polybutylene plumbing-related claims of each and every one of the approximately 110,000 Claimants represented by FH&G against Shell and Celanese as defined herein.

2. *Cash Payment*. Subject to the terms hereof, on or before January 19, 1996 ("the funding date"), Shell and Celanese shall pay FH&G the collective sum of ONE HUNDRED SEVENTY MILLION AND NO/100 DOLLARS ($170,000,000) (the "Funds"), to be held in an escrow account (the "Primary Escrow Account") at First Interstate Bank of Texas, N.A. ("FIB"), or other mutually agreeable bank, with FIB or other mutually agreeable bank serving as escrow agent ("Escrow Agent") for future

distributions to attorneys and Eligible Claimants. All escrow accounts created under this Agreement shall be subject to the escrow and/or trust agreement consistent with the terms of this Agreement and acceptable to all Parties, and Shell and Celanese shall not be obligated to fund any part of this Agreement until these escrow agreements are reached. All parties will use their best efforts to complete the escrow agreement prior to or by January 19, 1996. Subject to the terms hereof, this cash payment is to be distributed among Eligible Claimants representing approximately sixty thousand (60,000) Property Units as defined herein according to a formula developed by FH&G, approved by the Special Master, as defined herein, and approved and accepted by Eligible Claimants.

The Funds consist of two components: (1) $20 million in full payment of any and all expenses represented by FH&G to have been incurred by FH&G in prosecuting the polybutylene litigation; and (2) $150 million representing cash payments to the Eligible Claimants and attorneys' fees.

* * *

5. *Replumbs*. Within two years from the date this Agreement is executed, Shell and Celanese shall replumb as many of, but not more than, sixty thousand (60,000) Property Units that qualify for replumbs under paragraph 6 below; however, in no event shall any replumb obligation of Defendants apply to recreational vehicles. The scope of the replumb is defined in Exhibit "F" attached hereto and incorporated herein by reference. For the purposes of this Agreement, the term replumb includes the scope of replumb as defined in Exhibit "F" as well as replacement of stops and supplies and/or yard lines if a PB Plumbing

System is not present in the Eligible Claimants' Property Unit. For those Eligible Claimants that have already received replumbs due to a leak from an entity other than Defendants, the CPRC or the PCG, Defendants agree to reimburse the Eligible Claimant for the amount of the reasonable documented replumb cost borne by such Eligible Claimant. If the Defendants reimburse an Eligible Claimant for their replumb costs, the number of units included in this reimbursement will be counted toward the sixty thousand (60,000) property units subject to replumb, but will not be counted as a reduction in the $170 million payment.

6. *Conditions for Settlement and Payment.* For an individual Claimant to be an Eligible Claimant ("Eligible Claimant") qualifying for settlement, replumb and/or payment under this Agreement, the following conditions must be met:

a. Claimant and Claimant's Property Unit must be individually represented by FH&G.

* * *

c. FH&G represents to the Defendants that an Eligible Claimant shall have participated in the litigation process in some manner including, but not limited to, providing claim/damage information for answering written interrogatories, having their Property Units inspected, or having their deposition taken.

* * *

e. An otherwise Eligible Claimant whose property has not already had a leak before the execution date of this Agreement will be entitled to a replumb within three (3) months of their first leak if such leak occurs on or

before July 1, 2000 or within the applicable time periods as defined in the *Cox* agreement attached hereto as Exhibit "C," whichever is later. With regard to multi-unit properties, a leak in one unit entitles the entire building to a replumb; however, a leak in a yard service line does not trigger a replumb of the building's interior plumbing and vice versa.

f. For those Claimants that do not qualify for replumb or payments under this Agreement because they have not met the criteria set forth to qualify as an Eligible Claimant and the Special Master appointed by Judge Russell Lloyd ("Special Master") pursuant to Paragraph 20 has approved that they are therefore not Eligible Claimants as defined under this Agreement ("Ineligible Claimants"), such clients are already included in the definition of the class in the *Cox* class action filed in Union City, Tennessee. FH&G will communicate in writing to each Ineligible Claimant that their claims are subject to dismissal, that their opt-out has been invalidated and will recommend in writing that these Claimants remain as class members in the *Cox* class action and receive the benefits and relief set out in the *Cox/Spencer* settlement. To effectuate this provision, FH&G will immediately make a motion to the *Cox* court for an order approving this communication to Ineligible Claimants and the process set forth below. Approval of this process by the *Cox* court must be obtained before either Shell or Celanese is obligated to fund pursuant to paragraph 2.

Those Claimants receiving relief under the *Cox* class action shall not be included in the sixty thousand (60,000) replumbs described above; nor shall they be

entitled to any distribution of the ONE HUNDRED SEVENTY MILLION AND NO/100 DOLLARS ($170,000,000.00) FUNDS.

Process: With regard to Ineligible Claimants who are entitled to relief in the *Cox* class. FH&G will identify such Ineligible Claimants and mail to each of these a letter approved by the Defendants and the *Cox* court giving them thirty (30) days in which to opt out of the *Cox* Class Action on the following schedule from the date of this Agreement, as follows:

(1) within sixty (60) days of the date of agreement, FH&G will identify to the Special Master and Defendants and make the aforesaid mailing to such Ineligible Claimants with 25,000 Property Units; and

(2) within one hundred fifty (150) days of the date of the agreement, FH&G will identify to the Special Master and Defendants and make the aforesaid mailing to such Ineligible Claimants with an additional 25,000 Property Units.

g. If, out of the 50,000 Ineligible Claimant Property Units, as set out in paragraph f above, more than 7,500 property units elect to opt out of the *Cox* class action, FH&G will refund to Shell and Celanese $750,000 of attorney's fees for every 1,000 Ineligible Claimant Property Units that elect to opt out over and above 7,500 opt outs.

To ensure sufficient funds to cover the refund called for above in the event there are more than 7,500 opt-out units, the Escrow Agent shall transfer to a separate Opt-Out Escrow Account at FIB the sum of $3.5 million from each of the first two distributions of Attorneys' Fees

made under paragraph 4.b. hereof. Within 10 days of FH&G's compliance with f(1) and (2), the number of Ineligible Claimants Property Units opting out of the *Cox* Class Action shall be reported by FH&G To the Special Master. The Special Master shall prepare a written recommendation to the *Cox* court concerning the number of such opt outs for delivery to the *Cox* court within five (5) business days. The Parties shall have an opportunity to submit a response to this recommendation to the *Cox* court within ten (10) business days of the submission of the recommendation to the *Cox* court. If Defendants have no objection to the recommendation, they agree to use best efforts to obtain the *Cox* court's approval of this recommendation. As soon as the *Cox* court has ruled on this recommendation, to the extent the *Cox* court has ruled that the total number of opt outs is less than 7,500, the Special Master shall direct FIB, in writing, to disburse the funds in the Opt-Out Escrow Account, to FH&G within three (3) business days. Interest earned on this escrow account shall be paid to the party who receives the disbursement. In the event both FH&G and Defendants are entitled to a disbursement from the Opt-Out Escrow Account the interest shall be paid to each party on the amounts returned to each party.

To the extent the *Cox* court has ruled that there are more than 7,500 opt outs and thus the Defendants are entitled to a refund, the Special Master shall determine the amount to be refunded pursuant to the above paragraph and then shall direct FIB, in writing, to disburse the funds to Shell and Celanese from the Opt-Out Escrow Account. If the refund to Defendants is less than the total amount retained in the Opt Out Escrow Account, such excess funds shall immediately be distributed as Attorneys'

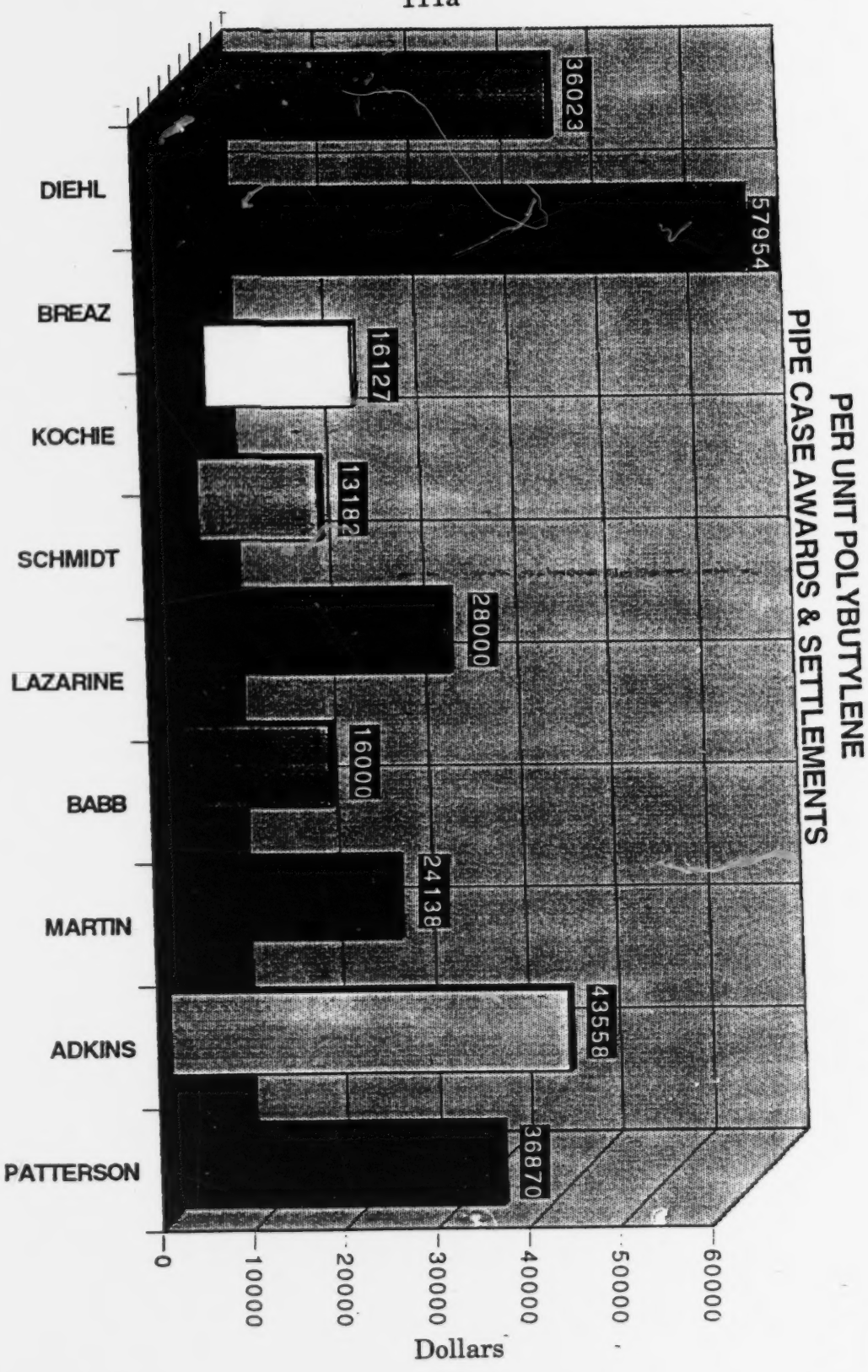
Fees as directed, in writing, by the Special Master. If the funds held in the Opt-Out Escrow Account are insufficient to cover such refund to the Defendants, then the entire fund shall be paid to the Defendants and the remaining refund amounts shall be paid to Defendants by deducting 50% of each subsequent Attorneys' Fee distribution and paying such monies to Defendants until the refund is paid in full.

* * *

/s/ Hugh H. Sam
Shell Oil Company
Date: 12/20/95

/s/ [Illegible]
Hoechst Celanese Corporation
Date: 12/20/95

/s/ George M. Fleming
Fleming, Hovenkamp & Grayson, P.C.
Date: 12/20/95


PER UNIT POLYBUTYLENE
PIPE CASE AWARDS & SETTLEMENTS
DIEHL
BREAZ
KOCHIE
SCHMIDT
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BABB
MARTIN
ADKINS
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